INDEX

PAGE

Jurisdictional Facts 1
Statement of the Case 2
Facts Material to Consideration of Question Presented 2
(1) Description of Appellant 2
(2) President's Proclamation 3
(3) Appointment of Director General 3
(4) Director General's letter of December 28, 1917 5
(5) Order No. 1, United States Railroad Administration 5
(6) Order No. 2, United States Railroad Administration 6
(7) Director General's Statement of January 8th, 1918 7
Argument 8
Did the Government take Possession of Appellant's Railroad. 8
What the Court of Claims Holds 8
The Federal Control Act 22
Did Congress Exceed its Powers in the Transportation Act... 29
Facts Showing Appellant's Road was Operated under Federal Control 31
Compensation 37
Measure of Compensation 43
Appendix 54

TABLE OF CASES CITED, ETC.

PAGE

Bauman vs. Ross, 167 U. S. 548-574 ..... 45, 51
Bigby vs. United States, 188 U. S. 400 40
Carpenter vs. United States, 17 Wall. 493 48
Chappell vs. United States, 160 U. S. 499 31
Duckett, A. W. & Co. vs. United States, 45 S. C. Rep. 38 ..... 10, 37, 42
Advance Case No. 108, decided November 17, 1924.
Federal Control Act, 40 Stat. 451 ..... 2, 24, 46
Johnson's Case, 2 Ct. of Cls. 291 49
Judicial Code, Sections 145, 242 1
Koshkoning vs. Burlon, 104 U. S. 668 31
Marbury vs. Madison, 1 Cranch 137 31
Monongahela Nav. Company vs. United States, 148 U. S. 312 30, 31, 51
Northern Pacific Railway Company vs. State of North Dakota, 250 U. S. 135 ..... 10, 15
Pope vs. United States, 26 Ct. Cls. 11 48
Portsmouth Harbor Land & Hotel Company vs. United States 250 U. S. 1, 250 U. S. 2, 43 S. Ct. Rep. 135 ..... 15, 16
Seaboard Air Line Railway Company vs. United States, 261 U. S. 299, 306 51
Shoemaker vs. United States, 147 U. S. 282 30
Transportation Act, 1920, 41 Stat. 456 ..... 2, 29, 46
Union Bridge Company vs. United States, 204 U. S. 364 31
United States vs. Benedict, 261 U. S. 294, 298 51
United States vs. Claflin, 97 U. S. 546 31
United States vs. Gettysburg E. Railway, 160 U. S. 660 30
United States vs. Gill, 87 U. S. 517 51
United States vs. Great Falls Manufacturing Co., 112 U. S. 645 41
United States vs. New River Col., 262 U. S. 341, 344 51
United States vs. North American Company, 253 U. S. 330 51
United States vs. Palmer, 128 U. S. 262 41
United States vs. Russell, 13 Wall, 623 ..... 18, 41
Vogelstein & Company vs. United States, 262 U. S. 337, 340 51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 315.

MARION & RYE VALLEY RAILWAY CO.,
Appellant,

vs.

THE UNITED STATES.

Jurisdictional Facts.

This is an appeal from a decision of the Court of Claims. The judgment to be reviewed is dated January 26, 1925, and is to the effect that Appellant is not entitled to recover any sum in this action of and from the United States and that petition herein be and the same hereby is dismissed.

On January 26, 1925, when order of Court was entered, the Court also entered its findings of fact, conclusion of law and opinion. (R. 26.)

On February 19, 1925, plaintiff made application for and gave notice of Appeal to the Supreme Court (R. 47) and on March 2, 1925, the application for Appeal was allowed. (R. 47, Judicial Code Sections 145 and 242.)

Statement of the Case and Facts Material to the Consideration of Questions Presented.

This case, correctly set forth in the opinion of the Court of Claims, is "a suit to recover the sum of $14,425.94, the amount of an award made by the board of referees duly appointed by the Interstate Commerce Commission under Section 3 of the Federal Control Act, 40 Stat. 451, and the Transportation Act of 1920, 41 Stat. 456, as the just compensation of the plaintiff for the alleged taking and use of its railroad property by the United States for the period beginning December 28, 1917, and ending June 29, 1918. The Director General of Railroads having refused to accept the report of the board of referees as a basis for settlement the plaintiff filed its petition in this court as provided by law." (R. 42.)

The case turns largely, if not entirely, upon the legal effect of the President's proclamation of December 26, 1917, and the acts and orders of the Director General in connection therewith in December, 1917, and the early part of the year 1918.

Important facts material to a complete understanding of the controversy are the following:

(1). December 28th, 1917, appellant was a common carrier engaged in general transportation, operating a steam railroad approximately twenty-two miles long, extending from Marion to Sugar Grove in the State of Virginia, where it connected with the Virginia Southern Railroad, then under the same management and ownership.

Appellant's railroad also connected with the Norfolk & Western Railway at Marion, Va., and received traffic from the Virginia & Carolina Railroad, a subsidiary of the Norfolk & Western Railroad System, through its connection with the Virginia Southern. (R. 6.)

(2). December 26th, 1917, the President of the United States issued a proclamation amongst other things declaring:

> "I * * * do hereby, through Newton D. Baker, Secretary of War, take possession, and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation; * * * * * to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers." (R. 28.)

(3). Said proclamation designates and appoints William G. McAdoo as Director General

with authority to assume possession, control and operation of the transportation systems therein mentioned and declares that—

> (a) "Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation.
>
> (b) "Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies." (R. 28.)

and said proclamation concludes in the following language:

> "From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. * *" (R. 29.)

Simultaneous with this proclamation, the President issued a statement to the public setting forth his reasons for taking over the transportation systems and assuring the owners of such systems of his intention to recommend that Congress make certain definite guarantees, to which statement we shall make further reference later on. (R. 30.)

(4). December 28, 1917, William G. McAdoo, named as Director General in the proclamation, issued a circular letter, copy of which was received by appellant, addressed "To the Presidents and Directors of all Railroad Companies" which in part is as follows:

> "Having assumed the duties imposed upon me by, and in pursuance of, the proclamation of the President dated December 26, 1917, you will, until otherwise ordered, continue the operation of your road in conformity with said proclamation." (R. 31.)

(5). Following the foregoing, on December 29th, 1917, the Director General issued Order No. 1, copy of which was received by appellant, declaring that pursuant to the order of the President, "the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the proclamation of the President of which proclamation and order officers, agents, and employees of said transportation systems are to take immediate and careful notice" and in said order it is specifically directed, amongst other things, that—

> "1. All officers, agents, and employees of such transportation systems may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.
>
> * * * * *

"3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

"4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

"5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

"6. Through routes which have not heretofore been established because of short hauling or other causes, are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing, notice thereof shall by carriers or shippers or both be given at once to the director by wire.

"7. Existing schedules of rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules of rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this order shall be brought immediately by wire to the attention of the director." (R. 32.)

(6). On the same date as Order No. 1, namely, December 29th, 1917, the Director General issued Order No. 2, copy of which was sent to ap-

pellant, addressed "To the Chief Executives of the Railroads," which in part is as follows:

> " * * * you are notified that, until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required. The accounts of your respective companies shall be closed as of December 31, 1917, and opened as of January 1, 1918, in the same manner as they have heretofore been handled at the close of one fiscal period and the beginning of another; and in the same manner that you should have handled your accounts had the Government not taken possession and control." (R. 33.)

(7). January 8, 1918, the Director General issued a statement, copy of which was received by appellant, addressed "To All Railroad Officers and Employees," with the request that it be posted by all railroads, which amongst other things declares as follows:

> "Every railroad officer and employee is now, in effect, in the service of the United States, and every officer and employee is just as important a factor in winning the war as the men in uniform who are fighting in the trenches." (R. 33.)

Appellant contended in the Court of Claims (1) that the President's proclamation and these acts and orders of the Director General had the effect to subordinate appellant's property to the use and control of the Government and conscripted

the officers and employees thereof as agents of the Government to operate the same, hence appellant is entitled to compensation; and (2), that there being nothing in the record to overturn the report of the board of referees as to the amount of compensation justly due and payable to appellant, the Court of Claims should have given judgment for the amount awarded by the referees.

The Court of Claims holds that the property of appellant was not taken by the Government and if there was technical control of the property by the Government it was of such a character that it did not cause any loss and does not justify the award of any compensation. (R. 45.) Appellant challenges the correctness of these conclusions and respectfully submits the case to this Honorable Court for its consideration and determination.

ARGUMENT.

(1) DID THE GOVERNMENT TAKE POSSESSION OF APPELLANT'S RAILROAD?

A careful reading of the opinion of the lower court compels the conclusion that little or no importance was attached by that court to the proclamation of the President and the action and orders of the Director General above referred to.

The Court seems to follow two lines of argument. In one part of its opinion the Court asserts that the proclamation by itself did not constitute a taking, and in another, that if there was technical control it was of such a character that

it did not cause any loss to the plaintiff and does not justify the award of compensation. As to the first it says:

> "If no other step had been taken and no agent of the President had done anything to carry into effect the proclamation of the President it would certainly not have been regarded as a taking of the property."

The Court recognizes that the President did act through an agent and in regard to the action of the Director General the Court, after quoting language of General Order No. 1, which it points out is addressed to all concerned and declares the Director General *has* taken possession and assumed control of certain transportation systems described in the proclamation of the President then proceeds to say:

> "The receipt of this order by the plaintiff did not constitute a taking of the plaintiff's property. It did not by its terms signify or state that the property of the plaintiff was being taken possession of."

The lower Court in this line of reasoning seems to have taken no account of the fact that the President in his proclamation, in the concluding paragraph thereof, declares that "after twelve o'clock on the said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director with-

out further act or notice," and the court seems to have overlooked the equally important fact that both the President and the Director General instructed that the properties be operated by the same officers and employees as was then being done and in the name of the respective companies.

This phase of the controversy seems to have been decided by the Supreme Court in Northern Pacific Ry. Co. *vs.* State of North Dakota, 250 U. S. 135, and in A. W. Duckett & Company *vs.* United States which was an appeal from the Court of Claims decided November 17th, 1924, 45 S. C. Rep. 38. In the former case the Supreme Court after referring to the proclamation of the President and the duties of the Director General thereunder, says:

> "Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control and operation of the Director General."

The court then quotes from the Act of March 21, 1918, commonly called the Federal Control Act, and proceeds to say:

> "Without going into detail it suffices to say that the first eight sections of the act comprehensively provided for giving effect to the purposes just stated and in a general way contemplated affording what was deemed to be just compensation to the owners for the use of their property. In addition it empowered agreements in the interest of security holders of the railroads and sanctioned pro-

visions deemed fair to the United States and to the owners of the property for betterments which might be required to be made during the term of control and for the return of the property when the Government possession came to an end, which return was to be accomplished within a stated period after the cessation of war by the proclamation of the ratification of a peace treaty."

Again the court says:

"No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question."

This case furthermore holds that the Federal control and operation of railroads worked a fundamental change authorizing the President to prescribe rates, etc., to which I shall allude in another part of this argument.

No one has disputed or would dispute that the railroads of the United States (generally speaking), were taken under Federal control from the date of the President's proclamation and the notice of the Director General thereunder and that they continued to be operated in accordance with the order of the Director General obviously intended to put into execution the President's proclamation.

It was not humanly possible for the President to exercise the powers conferred upon him by law in any other way. He could not take actual personal possession of several hundred railroad systems, located in forty-eight states and aggregating hundreds of thousands of miles, except in the manner this was accomplished, namely, by an unequivocal declaration that the properties were taken under Federal control at a definite date and that the persons then operating the properties should continue to do so until further order from him or the Director General.

If any one of the railroad systems of the United States were taken into Federal control and operation, how can it be said that all other railroads covered and included in the language used by the President and Director General were not likewise taken? The intention of the President, as well as the Director General, was that (using the precise language of the Director General) the Presidents and Directors of all railroad companies would "unless otherwise ordered continue the operation of their (your) road in conformity with such proclamation."

It thus appears that even though it be admitted for the sake of the argument that the proclamation of the President on December 26th, which announced that the carriers would be conclusively deemed within the possession and control of the Director General therein appointed without further act or notice, did not of itself constitute an immediate taking of the property, certainly the act of the Director General above pointed out,

which drafted the Presidents and Directors of all railroad companies as agents of the Government, was an actual and definite act taking over and appropriating the property of all carriers engaged in general transportation for such use as the Government might see fit to make of them.

It will be observed that the opinion of the Court of Claims does not take notice of the order of the Director General dated December 28th, 1917, but quotes from General Order No. 1 to the effect that the Director General "has taken possession and assumed control of certain transportation systems described in the proclamation of the President" and that the receipt of this order did not constitute a taking of plaintiff's property. The court in this connection says:

> "It (meaning General Order No. 1) contained nothing which ousted or tended to oust the property of the plaintiff from its control. There were no instructions in the order which caused the plaintiff to change the management and operation of its property. The plaintiff was not deprived of or circumscribed in any way in the use and enjoyment of its property."

With all due deference to the Honorable Court below, I insist that this conclusion is erroneous. In the first place, while it may be admitted that General Order No. 1 did not by its own terms signify or state that the property was being taken possession of, nevertheless when it is interpreted in the light of the general order or circular of

December 28, 1918, it necessarily in connection with the proclamation had the cumulative effect of immediately ousting the property of the plaintiff from corporate control and subordinated it to the uses of the Government. In the second place, this order necessarily circumscribed the use and enjoyment of the properties because the declarations and acts of the President and the Director General instantly revolutionized the railroads of continental United States into a national transportation system which not only subordinated their managements to Government control but in express terms declared that (1) the common and national needs should in all instances be held paramount to any actual or supposed corporate advantage; (2) required all terminals, equipment and facilities of every kind to be utilized without regard to ownership; (3) compelled the carriers to disregard the routes designated by shippers; and (4) in legal effect abolished traffic agreements between carriers and made revolutionary changes with regard to the establishment of through rates.

From the time the officers and employees of the various carriers were thus declared to be agents of the Government the properties were necessarily held and operated as parts of the national system completely subordinated to whatever use the Government might see fit to make of them or whatever control the Government might see fit to exercise.

It is worthy of note that the conversion of individual carriers into a national system not only circumscribed the management and operation as

already pointed out, but also diminished traffic density and earning power of some carriers, while increasing that of others. It is also a fact that notwithstanding the costs of operation were increased the carriers could not, without direction from the Government, apply to the Interstate Commerce Commission or otherwise procure such increases in rates as were absolutely necessary to compensate for the diminished tonnage and the increased cost of operation, and it was in recognition of this very fact that Congress subsequently enacted Section 204 of the Transportation Act of 1920.

The power to initiate rates is expressly conferred upon the President in the Federal Control Act, Section 10, but if there had been no such enactment the Court knows that a carrier which came within the meaning of the declaration of the President and Director General above mentioned, could not without direction or order from the Government initiate any increase in rates. See Northern Pacific Railway *vs.* North Dakota *supra*, wherein the court amongst other things holds that the Director General had been clothed with "complete and undivided power to fix rates."

A case which seems to be peculiarly applicable to the facts in this case is Portsmouth Harbor, Land & Hotel Company *et al vs.* The United States, 43 Sup. Ct. Rep. page 135. That is a case where the Government merely subordinated the property of the Hotel Company in an indirect manner. The Hotel Company owned an island lying west of the entrance to Portsmouth Harbor and

bordering on the ocean. Adjoining this island to the north and west is land of the United States upon which the Government erected a fort, the guns of which have a range over the sea front of the claimant's property. The case was tried and carried to the Supreme Court three times before the last decision was made.

In the first case (250 U. S. 1) it was decided that the mere erection of the fort and the fact that the guns were fired over the claimant's land on two occasions about two years and a half before the suit was brought, coupled with the apprehension that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States.

The second case (250 U. S. 2) was like the first, except for some occasional subsequent acts of gun fire, and the finding of the Court of Claims was again sustained.

The case finally went to the Supreme Court upon demurrer and the Supreme Court, in passing upon the sufficiency of the petition at which the demurrer was aimed, declares that the acts alleged would have the effect of imposing such a servitude as would constitute an appropriation of property by the Government for which compensation should be made.

The court says *inter alia*:

> "The question therefore is not what inferences should be drawn from the facts may be proved but whether the allegations if

proved would require or at least warrant a different finding from those previously reached. There is no doubt that a serious loss has been inflicted upon the claimant as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that—

> 'If the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea, to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.'

"That proposition we regard as clearly sound. * * *

"As the United States built the fort and put in the guns and the men, there is little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not. The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire

> when the United States sees fit, even if not infrequently, or they may be explained as still only occasional torts."

The case of United States *vs.* Russell, 13 Wall. 623, is peculiarly similar to the instant case in that the property remained in actual control of the owners, the purpose of the Government in giving notice to the owners being to subordinate certain steamboats to Government purposes if and when it became necessary. The property was subordinated to the Government's use through a letter from a Government officer to the owner of the boats reading as follows:

> "Imperative military necessity requires that you make no arrangement for private freight without first consulting this office and obtaining permission in writing so to do."

In the decision of the Court of Claims, from which an appeal was had to the Supreme Court, the lower court found that when the steamers were taken into the service of the United States the officers acting for the Government—

> "did not intend to appropriate these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed and to pay a reasonable compensation for such services and such was the understanding of the claimant; * * *"

The Supreme Court affirmed the decree of the Court of Claims, amongst others things saying:

> "Unexplained and uncontradicted the findings of the Court show a state of facts which plainly lead that the emergency was such that it justified the officers in each case in ordering the steamboats into the service of the United States. Such a taking of private property by the Government under the circumstances is everywhere regarded as justified and private rights under such extreme and imperious circumstances must give way for the time being for the public good, but the government must make full restitution for the sacrifice.
>
> "Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owners for the use of the steamboats and for his own services and expenses and for the services of the crews."

The President in his proclamation leaves no room for doubt as to the intent with which the railroads were all taken under Federal control, nor does the President leave any room for doubt as to the purpose of the Government to pay a definite measure of compensation for the use of the properties.

In a statement issued simultaneous with the proclamation the President said:

> "I have exercised the powers over the transportation systems of the country * * * because it has become imperatively necessary for me to do so. This is a war of resources

no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and the simplified method of coordination which have not proved possible under private management and control."

In this statement the President furthermore recognizes the fact that the managements of the carriers would be put at a disadvantage and that the earning power would be affected. Amongst other things he said:

"Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings and the committee (meaning a railway committee cooperating with the Government) was, of course, without power or authority to re-arrange charges or effect proper compensations and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the committee have already suffered from these circumstances and should not be required to suffer further. In mere fairness to them the full authority of the Government must be substituted. The Government itself will thereby gain an immense increase of efficiency in the conduct of the war and of the innumerable activities upon which its successful conduct depends."

The language used in the statement is incompatible with any other theory than that the Presi-

dent intended to draft all of the railroad properties of the United States engaged in general transportation into Government service just as all citizens of military age were drafted, leaving question as to fitness or desirability to be determined at a later date. Also that unified operation would necessarily affect the earning power of the carriers.

Before leaving this phase of the case I call attention to the fact that the language used by the President in describing the transportation systems which were taken into Federal control covers and includes in specific terms "each and every system of transportation * * * consisting of railroads and owned or controlled systems of coastwise or inland transportation engaged in general transportation; whether operated by steam or by electric power * * *," but declares that "nothing herein shall be construed as now affecting the possession, operation and control of street electric passenger railways, including railways commonly called interurbans" and in this connection says "by subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or operation may be taken of all or any part of such street railway systems."

It is also worthy of note that in the statement issued by the President along with the proclamation it is declared:

> "Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Govern-

ment as they could be by the Directors of the several railway systems. Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30th, 1917; and I am entirely confident that Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment." (Rec. 30.)

This brings me to a brief discussion of the effect of subsequent legislation which relates to these acts of the President.

The Federal Control Act.

On March 18, 1918, Congress passed "An Act to Provide for the Operation of Transportation Systems While Under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes," commonly called the Federal Control Act.

It is plain to be seen that a part of this Act, particularly Sections 1 to 4, inclusive, is intended to carry out the promise of the President above referred to.

It specifically empowers the President to make guarantees in the identical way he assured would be asked of Congress and is a ratification and confirmation of all the President had done and promised. It declares:

> "That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen."

It also declares in the same section—

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: * * *."

In the court below the Government's counsel devoted considerable time arguing that this provision of Section 1 of the Federal Control Act is of no effect either as evidence that the roads described were taken into Federal control by the Proclamation or as an exercise of legislative power which *ipso facto* brought them into Federal control. Counsel for the Government asserted that it appears from proceedings before the Committees in Congress and is so notorious as to require the court to take judicial notice thereof, that this provision was procured to be inserted in the Federal Control Act by representatives of the so-called Short Line Railroads of which appellant is one, and that it is apparent that this provision was procured to be inserted because it was recognized that the President in his discretion did not take and operate these properties.

While it would seem that the legal and practical effect of the proclamation and the orders and notices of the Director General issued in connection therewith, are conclusive of the question, it may set at rest any possible doubt to see just what did occasion this act of Congress in relation to this class of roads.

It is a matter of history that shortly after the railroads were taken under Federal control, the Director General took the position that these short line railroads were not needful or desirable. This attitude first became publicly known through statements made before the Committee on Interstate and Foreign Commerce of the House of Representatives of Congress in the hearings of bills

introduced in the House and Senate in January, 1918, in aid of the President's Proclamation, which resulted in the passage of what is commonly called "The Federal Control Act" of March 21, 1918.

The proponent of the bill which was pending in the Senate was Hon. Geo. W. Anderson, then a member of the Interstate Commerce Commission, who, together with Hon. John Barton Payne, appeared in behalf of the Director General. Commissioner Anderson while presenting the proposed bill to the Committee of the Senate said:

> "If the President thought it was necessary to take an industrial railroad which runs up to a coal mine—and coal is very much needed for war purposes—and use that as part of the system of transportation, for getting that coal, to supply it to our allies, and did not do it—I think he would be derelict in his duty.
>
> "Senator Underwood of the Committee said: 'That is a good illustration and that is what I am coming to. If under this order he has taken over all of these lines, then practically every industrial railroad is within the jurisdiction of the Director General today.'
>
> "Commissioner Anderson: 'The Proclamation says that he will take control of each and every system of transportation, and the appurtenances thereof located wholly or in part within the boundaries of continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation.'
>
> "That is the limiting phrase * * * 'engaged in general transportation,' etc.

"That is what he took, and then there is an exception that I read a few moments ago, excluding the trolleys and interurbans; and that the extent of the Proclamation may be hereafter narrowed or extended. That is the way it stands now.

"Senator Cummins: 'There is no provision in this bill for compensation to such roads unless they have been taken over by the President.'

"Commissioner Anderson: 'That is true.'

"Senator Underwood: 'Up to this time the only taking over has been the Proclamation by the President. There has not been any technical taking over, but only as the railroads recognize the Proclamation that has been issued. They are taken over if the Proclamation is broad enough, just as well as the British systems are.'

"Commissioner Anderson: 'If they are railroads engaged in general transportation they are taken. If they are not railroads engaged in general transportation they have not been taken.'

"Senator Underwood: 'That is what I wanted to know.' " (See Published Proceedings, Senate Resolution 171, Part III, pages 476 and 477.)

In hearings before the Committee of the House, H. R. 8172, Judge John Barton Payne, who appeared as representative for the Director General in support of the proposed bill, for the first time disclosed the attitude of the Director General as being opposed to retaining many of the short line railroads. I quote certain statements made by Judge Payne in answer to questions of members

of the Committee. While Mr. Bird M. Robinson, President of the American Short Line Railroad Association, was presenting a proposed amendment to the bill, Judge Payne interposed the following:

"Mr. Payne: Mr. Chairman, I wonder whether it would help the Committee, and perhaps it was due to these gentlemen, to make a brief statement about the way these roads are coming in to the director—applications from these roads for a determination whether they are included in the President's proclamation. When I say 'these roads' I haven't any reference to particular roads, which may be here, but the short roads.

"The act of August, 1916, under which the President's proclamation provides for the taking over by the Government of a system or systems, or parts thereof, of transportation, it follows, of course, that unless these short roads constitute a part of a system of transportation necessary to be used by the Government in war times, that they do not come within the purview of the President's proclamation. So that it must not be assumed that all of these roads are included.

"Mr. Esch: Mr. Payne, practically every one of these short lines. If that short line hauls lumber, products of the mine, wouldn't that bring it within the system or parts of systems?

"Mr. Payne: Very likely, and that is what I want to make clear. It does not follow that all these roads are included. Many of them will be included—for instance, roads that operate to munition factories or lumber

camps necessary now for the Fleet Corporation to get—whatever is necessary as a part of any system of transportation for war time needs is taken over, and you must, of course, provide a means for determining what is just compensation.

"Mr. Hamilton: Mr. Payne, is any discretion given to the director under the proclamation in determining whether a road shall be included in a system?

"Mr. Payne: It must be so, because it is a physical fact.

"Mr. Hamilton: For illustration, here is a short line which is a feeder, to some extent. Would the director be permitted to exclude that road operating under a discretion, or would it necessarily have to be included?

"Mr. Payne: It depends entirely on the facts; the proclamation contemplates the roads may be dropped out. You have got to consider; somebody has got to consider. (See Pages 239, 240, Part 2, Hearings on H. R. 8172.)"

Certain Proceedings in the Senate Committee on Interstate Commerce in June, 1918, are submitted as appendix hereto which seem to clearly show that at that time the so-called Short Line Railroads were considered within Federal control.

Argument that this provision of the Federal Control Act is evidence that anybody believed the short line roads were not included in the proclamation or that it was deemed necessary to procure Congressional action to bring them under Federal control, is thus shown to be fallacious. What was manifestly at the bottom of the matter was the

fact that the Director General had the right to relinquish them and was asserting that they were not needed.

Whatever else may be said of this provision it must be read and interpreted in connection with the law under which the President issued his proclamation and when thus viewed it is a limitation upon the power of the President to consider one class of railroads as needful or desirable and leave out the other class mentioned in the Act.

Did Congress Exceed Its Powers in the Transportation Act?

This brings me to another contention of the Government in regard to the provision of the Transportation Act. It was argued below and may be argued here, that our Government is one of divided powers and that the provision under consideration is a direction to coordinate branches of the Government to treat these carriers as if they had been taken, whether they had been so taken or not, or else it is an instruction to treat the facts bearing upon the question of whether these roads had been taken as conclusive that they had in fact been taken. That the taking, if at all, was the act of the President and until he exercised such power and took possession of the road it was not taken.

With all deference to Government's counsel I do not think this is sound in law or logic. In the first place it should be remembered that in the passage of this law the power of the President was coordinated with that of the Congress. He ap-

proved the Act. He did not veto it as he could have done. In the second place, the Act is not a mere declaration or the expression of opinion as to former legislation or the President's proclamation. It is an unequivocal expression of legislative will on a matter strictly within the powers of the legislative department. It declares the class of roads described "shall be held and considered as within Federal control * * * and necessary for the prosecution of the war * * * and entitled to all the benefits of the provisions of this Act."

The theory that Congress could not with the President's approval declare the roads as thus operated to be in Federal control, is to deny to Congress the very power by which they were taken in the first instance. The courts hold that whether property is to be taken or condemned for public use is a legislative question. Shoemaker *vs.* United States, 147 U. S. 282; Monongahela Nav. Co. *vs.* United States, 148 U. S. 312; United States *vs.* Gettysburg E. Ry., 160 U. S. 668.

The Government's contention reduced to its last analysis is that notwithstanding Congress and the President in the exercise of their coordinated functions declared in the form of a legislative act the necessity for public use, and commanded that these roads be held and considered as within Federal control, thus designating those in possession as agents of the Government just as the President did in his proclamation several months before, that such exercise of power is subject to review by the judiciary. What Congress did is not subject to

review. That is a political and legislative matter and not within the jurisdiction of the courts. Chappell *vs.* United States, 160 U. S. 499; Union Bridge Co. *vs.* United States, 204 U. S. 364.

The Government's counsel in the lower court in support of the contention that the provision of law was an attempted usurpation of executive and judicial power, cited the following cases: Marbury *vs.* Madison, 1 Cranch 137; United States *vs.* Claflin, 97 U. S. 546; Koshkonong *vs.* Burlon, 104 U. S. 668; and Monongahela Nav. Co. *vs.* United States, 148 U. S. 312.

These cases seem to have no other application than that they point out and enforce the distinction between legislative and judicial power. They all clearly recognize that where an act is the expression of legislative will or deals with a question of political and legislative character the jurisdiction of Congress is exclusive and supreme. In the Claflin case it is held that "even a declaratory act, or an act directing how a former act shall be construed is inoperative in the past though controlling in the future."

Facts Showing Appellant's Road Was Operated Under Federal Control.

The Government contended and the Court of Claims holds that during the whole period for which Plaintiff claims compensation it had absolute control of its property and operated it exactly as it always had operated it. The lower court makes no mention and seems to take no notice of

the fact that for the first few months of Federal control every road within the terms of the proclamation was operated by the same officers and employees exactly as they had previously operated them, but in this connection quotes the letter of relinquishment from John Barton Payne and says the letter shows on its face that the General Counsel of the Railroad Administration did not believe that the property of the plaintiff was under Federal control and the letter had for its object the removal of any possible question about the matter. It is regrettable that the court did not see fit to discuss other and more important facts upon which appellant does rely, notably the unequivocal language of the proclamation and statement of the President, the Director General's notice of December 28, 1917, addressed "To the Presidents and Directors of All Railroad Companies," and his other orders and notices hereinbefore mentioned; also the finding of the Board of Referees as follows: "We find and report that Federal control of plaintiff's railroad property within the intent of the Federal Control Act was established in law and fact at 12 o'clock noon on December 28, 1917, and continued until June 29, 1918." I shall again refer to report of the Board of Referees. I mention it here merely to show that its finding of fact above quoted and which is by law of prima facie value is not overturned or rebutted by facts in the record. If so, what are such facts?

It is true as stipulated by counsel that the same officers operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior

thereto; that it never received any instructions from the Director General applying to it individually. That it received no orders with reference to the expenditure of money for maintaining its road and received no instructions as to how it should be operated or maintained other than those heretofore mentioned and that "the appellant from December 28, 1918, to December 29, 1919, continued to operate its road exactly as it had always operated it." (R. 39-40.)

This admission goes no farther than to say that there was no change whatever in the manner in which the road was operated before and during the first six months of 1918. That the officers received no specific directions from the Director General as to how it should be operated or maintained and that it was operated by the same officials as had theretofore operated it.

As opposed to this admission is the fact that both the President and Director General instructed that the roads be operated as theretofore unless by general or special order it should be otherwise directed; and in addition to the notices and orders of the Director General addressed to the railroad managements generally, but which were sent to and received by appellant as already shown, the following facts should be considered:

(a) Upon receipt of Director General's Order No. 1 the manager of appellant's road wired the Director General and asked if the road was under Federal control and if he should obey the order, and received reply from Director General directing him to obey the order. (R. 36.)

(b) Passage of the [redacted] Act containing provision last above discussed declaring that all such roads as appellant be held and considered as under Federal control and necessary to the prosecution of the war.

It is appropriate in this connection to call attention to the fact that on June 29, 1918, the same date as Judge Payne's letter referred to above, the President issued a public statement that is incompatible with any other theory than that he had assumed control of these so-called short line railroads and was holding and operating them through their former managements. The President in this statement says *inter alia*:

> "Under the Act of March 21, 1918, it becomes necessary for the United States Railroad Administration, prior to July 1, 1918, to exercise the responsibility, created by section 14 of that act, of determining what railroads or parts of railroads it is not needful or desirable shall continue under Federal control.
>
> "So far as it has been practicable, in such a complicated matter, to develop the facts up to the present time, it has become apparent that there are large numbers of the shorter railroads whose Federal control is not needful or desirable.
>
> "The Railroad Administration has therefore provided that all such railroads be relinquished, except in cases where it has already been ascertained that it is needful or desirable that such railroads shall be under Federal control. * * *
>
> "It may be that the creation of Federal control over railroad systems in general will tend

to change unfavorably the situation of many of these smaller railroads, unless special care shall be taken to avoid such unfavorable results, with consequences detrimental both to the local public service and to the just interests of the railroad owners.

"To avoid these consequences and to preserve in every reasonable respect a status for the railroads so relinquished as favorable as that which they enjoyed during the three-year test period (the three years ended June 30th, 1917), great care will be taken to see that the railroads so relinquished are given fair divisions of joint rates, are insured a reasonable car supply—circumstances considered—and are protected against any undue disturbance in the routing of traffic.

"In order to make sure that a continuing study and supervision shall be provided for the carrying out of the policy thus outlined, there will be created at once in the Railroad Administration's Division of Public Service and Accounting a Short Line Railroad Section, the manager of which will be charged with the special duty of ascertaining what is necessary in order to give as to these matters reasonable protection to the railroads relinquished."

(See Bulletin No. 4, U. S. Railroad Administration, Director General of Railroads, Page 117.)

Two things are apparent from this statement:

(1) That the President considered these roads as in Federal control and if not relinquished by July 1, 1918, as provided in Section 14 of the Federal Control Act, could not be relinquished sepa-

rately from the other roads except by agreement.

(2) That the President realized (as stated), that Federal control of the railroads in general might unfavorably change the situation of these smaller roads when relinquished, and to avoid these consequences and to preserve in every reasonable respect a status as favorable as that they enjoyed during the three-year test period (the three years ended June 30, 1917) great care would be given to see that the roads so relinquished are given fair divisions of joint rates, are insured a reasonable car supply and protected against any undue disturbance in the routing of traffic.

It will also be noted that the President declares there will be created at once in the Railroad Administration "a short line railroad section the manager of which will be charged with the special duty of ascertaining what is necessary in order to give as to these matters reasonable protection to the railroads relinquished."

The fact that an astute and zealous lawyer acting for the Railroad Administration should express himself as did Judge Payne in the letter quoted by the lower court, ought not to nullify this very obvious understanding of the President nor overturn the facts clearly deducible from the statement. It is peculiar, if not significant, that this letter was not signed officially. Inasmuch as roads were lawfully relinquished and could not be brought back into Federal control except through a second proclamation of the President acting in conjunction with the Secretary of War, it is conceivable that a far-seeing lawyer might designedly

seek to leave the Government in as easy position as possible.

Compensation.

The lower court holds that the just compensation to be awarded (in this case), is to be measured by the loss caused to the property by the taking, whereas appellant respectfully submits that if the property was taken into Federal control as we contend, then appellant is entitled to the rental value during the time it was in Government use or under Government control.

Be it remembered that there is no dispute of title as between appellant and the Government. The Government recognized appellant's title and appellant recognized the right of the Government to subordinate the property to public use for carrying on the war. Whether or not the taking was an exercise of the power of eminent domain or a contract which established the relation of landlord and tenant is unimportant. In either case if this guaranteed return be not applied the value would have to be determined by the productiveness or earning power ascertained as of the time of the taking. But I think the correct view is to treat the relationship established as one of contract rather than the exercise of the power of eminent domain. A. W. Duckett & Co., Inc., *vs.* United States Advance Case No. 108, decided November 17, 1924.

It should be borne in mind that when the roads were taken the President proclaimed what the

measure of compensation would be. He declared that—

> "Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment."

The President also said—

> "The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful."

Owners of the properties made no objection but in fact assented to the terms proposed by the President, awaiting as they had a right to do preparation of the form of agreement to be entered into as between them and the President. These forms of agreement, as everybody knows, were negotiated as between the Director General, as agent of the President, and the two classes of carriers, namely, Class I or trunk road carriers, and that class of carriers known as short line railroads.

The forms of agreement finally adopted are set forth in Bulletin No. 4 titled "Public Acts—Proclamations by the President Relating to the United States Railroad Administration and General Orders and Circulars Issued by the Director General of Railroads," pages 39 to 84, inclusive. These forms were not adopted until sometime after the first of July, 1918, and in the meantime the short line railroads, generally, had been relinquished from Federal control. If these facts did not establish contractual relations, definitely fixing the compensation agreed to be paid, what is their legal effect?

We believe the President was authorized under existing law when the roads were taken to agree as to the compensation to be paid without further act of Congress, but the Court should bear in mind that Congress in Section I of the Federal Control Act, passed March 21, 1918, authorized the President to agree with and to guarantee to any carrier making operating returns to the Interstate Commerce Commission that during the period of Federal control "it shall receive as just compensation

an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen," and declared the average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President.

Here was definite approval of the declaration of the President as to the compensation which would be paid to the carriers, which related back to the promise of the President when the properties were taken into Federal control, and which constitutes the terms of the obligation upon which the minds of the respective parties met; hence ought, in all good conscience, be utilized and enforced as the measure of compensation in every case where the property of a carrier was taken into Federal control by the President's proclamation.

Plaintiff's claim rests upon the promise of the United States to pay for the use of the property a sum equivalent to the average of the three-year period mentioned in the Proclamation and the law. There is a wide distinction between this case and an ordinary condemnation case where the Government takes permanent possession of property under the right of eminent domain as ordinarily resorted to.

In the case of Bigby *vs.* United States, 188 U. S. 400, the Supreme Court points out the distinction between those cases where lawful authority has

been previously given for the taking of private property for public use under the principles of an implied contract and where such property is taken without previous authority conferred by law. The Court says:

> "Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the Government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in United States *vs.* Russell, 13 Wall. 623, which was an action to recover for the use of certain steamers used in the business of the Government pursuant to an understanding with the owner that he should be compensated; or, in United States *vs.* Great Falls Mfg. Co., 112 U. S. 645, in which it appeared that certain private property was appropriated by officers of the Government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in United States *vs.* Palmer, 128 U. S. 262, which was an action to recover for the use of a patent which the Government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which is used for the Government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the Government would pay for such use."

In the instant case the implied contract went beyond the mere implication to pay for its use but involved such acts and declarations as that the minds of the parties met as to the precise compensation which would be paid.

In the case of Duckett & Company *vs.* United States *supra*, the notice given by the Government was "to whom it may concern" which stated—

> "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises."

but was not served directly upon the tenant whose leasehold was taken. Nevertheless this honorable Court, by Mr. Justice Holmes, says:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order."

and in another part of the opinion—

> "We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction but promised for compensation seemingly to all."

This case seems to support the contention that the President's promise as to the measure of compensation assented to by the carriers did not necessarily require the approval Congress gave in the

Federal Control Act and that there is no ground for attributing to the Government the extraordinary intent to pay the stronger railroads the guaranteed amount based upon the three-year test period and exclude the weak lines.

Measure of Compensation.

We earnestly insist that the amount of compensation to which plaintiff is entitled has been established by the report of the Board of Referees and the legal effect of this report cannot be overcome unless it appears from the record that it is without evidence to sustain it or that there are facts in the record which overcome the prima facie effect of the Board's action. The Court of Claims concedes that the Referees' findings are prima facie but seems to question the legal effect on the ground that the Board applied an erroneous measure of compensation. As to this it says in the beginning of its opinion (R. 42):

> "The finding of the amount of the award for just compensation by the board of referees is prima facie in this court, but the prima facie effect of the award may be overcome if it appears that the board applied an erroneous measure of compensation, or if it appears from the facts found that there was no taking by the Government of plaintiff's property for public use."

I have tried to point out that the Court is in error in holding that there was no taking by the

Government, hence I now address myself to the question as to whether or not the prima facie effect of the Referees' award is overcome upon the grounds stated that the Board applied an erroneous measure of compensation.

What measure of compensation did the Board apply? In its findings the Board declares that compensation for use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the Government, and agreement to pay the fair rental therefor. (R. 12.) That evidence of earning power offers the best measure and that it appears furthermore that the rental value must be taken as of the commencement of Federal control citing authorities. (R. 13.) The Board then says:

> "Since we are limited to the determination of the value of the lease as of December 28, 1917, it follows that only the then known conditions and in addition such as might be foreseen by reasonably intelligent business men can be given any weight in our conclusions. This is based on justice and sound reasoning, *because the lessor of a business would have no standing in court to urge a reduction in rental if the results of his own management showed a declining income, and because he must also assume its risks—the lessee being no longer in a position to dictate its policies and its success depending chiefly upon the efforts and sagacity of the lessor alone.* Accordingly our judgment of the rental value of the lease in this case must be based largely upon the evidence before us of plaintiff's earning power

prior to December 28, 1917. It is quite true, as respondent's attorney points out, that this Board is in no way bound by the standard return as a measure of just compensation. Nevertheless, it is worthy of our most earnest consideration that past earning power as evidenced by an average for a period of years was adopted as a basis of value in the Federal Control Act after long investigation and was the agreed measure in the standard contract entered into by the Railroad Administration and most of the carriers after many months of conference. However, such evidence of past earning power must be considered, together with any evidence of conditions existing December 28, 1917, which might then have been reasonably expected to affect the future revenues and expenses of a railroad."

The Court of Claims in its opinion does not directly decide that this measure of compensation is erroneous but after asserting that the question of compensation is a judicial one and that the Court is not bound to adopt the method of ascertaining it which may be suggested by the statute, then proceeds to say:

"The just compensation to be awarded is to be measured by the loss caused to the property by the taking. The plaintiff in this case is entitled to receive the value of what it has been deprived, and no more. 'To award it less would be unjust to it, to award it more would be unjust to the public.' Bauman *vs.* Ross, 167 U. S. 548, 574. The question is what has the plaintiff lost? If it has lost nothing it would be gross injustice to require the United

States to pay something for nothing. What has the plaintiff lost by the supposed taking? There is no proof that it has lost anything thereby." (R. 44.)

* * * * * * *

"All the provisions of the statutes which look to compensation of owners of railroad properties could only apply to properties which were taken possession of by the Government and actually operated and controlled by it. Surely Congress never intended that the United States should pay for the losses or depreciation of properties which the Government did not operate, did not control, did not use, and did not take possession of." (R. 44-45.)

How Congress felt about this matter seems clearly indicated by the language of Paragraph 7 of Section I of the Federal Control Act and Section 204 of the Transportation Act of 1920 hereinbefore referred to.

Section 204 of the Transportation Act of 1920 is titled "Reimbursement of Deficits During Federal Control" and is plainly intended to do just what the Court of Claims seems to think Congress would not do, namely, reimburse the owners of such property as the one under consideration in the instant case for losses incurred while operated, not by the Government, but by their owners. It declares among other things:

"The term 'carrier' means a carrier by rail-

road which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation * * *."

(Note this is same language as used in Paragraph 7 of Section I of Federal Control Act describing the so-called short line railroads.)

However, it is obvious from a reading of the opinion of the Court of Claims that in proceeding to the conclusion that the Board of Referees applied an erroneous measure of compensation, such conclusion is, as necessarily it must be, based upon the proposition that there was no taking by the Government. We have discussed that question and readily concede that plaintiff's claim must fail if its property was not taken in Government control within the meaning of the Constitution and law. On the other hand, if in legal effect plaintiff's property was taken into Federal control, we respectfully insist that the measure of compensation applied by the Board of Referees is not erroneous and there is no evidence in this record to overcome the prima facie effect of the Referees' report.

As basis for its finding as to just compensation, as we have heretofore pointed out, the Board of Referees considered that there was and is an implied obligation on the part of the Government to pay for the temporary use of the property, com-

pensation equivalent to the rental value of the property, or, stated in another way, compensation based upon the productive value of the property to its owner at the time of the taking. I submit this is sound law.

In the case of Carpenter *vs.* United States, 17 Wall. 493, the Supreme Court *inter alia* says:

> "However, it has sometimes been said an action of debt or assumpsit for the use and occupation of land can be maintained only when the relation of landlord and tenant has existed. This is not strictly accurate if it be meant that a demise must be in fact proved. * * * Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of plaintiff without an express contract the law implies a promise * * * to make compensation or to pay a reasonable rent for his occupation. In such a case the consent of the owner to defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise or doubtless prima facie evidence of a demise. This is because a demise with a corresponding agreement to pay rent, or make compensation for the use of property, is consistent with an unexplained entry by the owners consent and because it is a reasonable presumption that occupation thus taken was intended to be paid for."

In the case of Pope *vs.* United States, 26 Ct. of Clms. 11, it is stated in the head note:

"The court adheres to the rule in Johnson's case, 2 Ct. of Clms. 291, that the rule for the measure of damages for the temporary occupation of land by the Government is the *value of the occupancy at the time of entry.* (Our italics.) The relations of landlord and tenant become fixed at the time of the entry; and when holding continues and becomes tenancy from year to year, neither party can be made subject to the fluctuations of real estate in the market. Rent once fixed continues until changed by agreement."

It would seem to be a matter of supererogation to argue that just compensation for the use of property temporarily taken from its owner could be measured by its productive use at a subsequent date. Suppose the property had earned more than the standard return while under Federal control. Could the owner claim that as a measure of just compensation? This question has been considered in an able opinion by the Board of Referees in a more recent case, viz: Docket No. 122, Wyandotte Terminal R. R. Co. *vs.* Director General, which case with others now being prosecuted against the Director General may come before this honorable Court for determination. The argument of the Board seems so strongly supported by authority and so sound in logic as that I quote therefrom at some length as a fitting conclusion to this brief:

"Even though we accept as correct the government's position taken in its motion to dismiss to the effect, in substance, that plaintiff must have shown that the earnings of the rail-

road during federal control and admittedly retained by plaintiff were less than what they would have been if plaintiff had been left in full control of its property and that that loss was directly attributable to some act or acts of the Director General, there would still be just grounds for denying the motion. It is well known that the railroads, in common with other industry, were experiencing sharp and progressive rises in operating costs at the commencement of Federal control. Such conditions warranted commensurate increases in the rates of a public service corporation that could have been assumed without hardship by the majority of shippers during the then generally prevailing high price conditions. It cannot be said with certainty that plaintiff would have instituted such rate increases but it may be said that its authority to do so was taken from it and the undivided power to fix rates was conferred upon the Government. The record shows a loss or decline in net earnings for the period of Federal control as compared with average net earnings for preceding years. Under these circumstances it must be considered that some part of the loss or decline in earning power was directly attributable to the Director General's failure to fix rates which would keep pace with the rising costs of operation. .Giving full recogition to the fact that governmental management was properly directed toward the achievement of results in the successful prosecution of the war rather than the successful management of any particular railroad it must be still conceded that the loss resulting from the public use of this railroad was a loss for which compensation should be paid under the constitution.

"The determination of the just compensation to be paid for private property taken for public purposes is unquestionably a judicial question and the average annual railway operating income for the three years ended June 30, 1917, fixed by the Federal Control Act as maximum compensation for any voluntary agreements made between the President and the railroads is not binding upon this board. That average annual railway operating income is an element that may be considered by the board only in so far as it may be considered representative of the value of the use of plaintiff's property at the time of the taking and under the circumstances and conditions then existing. It is settled by the decision of the United States Supreme Court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States*, 262, U. S. 337, 340; *United States* v. *New River Collieries*, 262 U. S. 341, 344; *Seaboard Air Line Ry.* v. *United States*, 261, U. S. 299, 306; *United States* v. *Benedict*, 261 U. S. 294, 298; *United States* v. *North American Co.*, 253 U. S. 330; *Bauman* v. *Ross*, 167 U. S. 548; *Monongahela Navigation Co.*, v. *United States*, 148 U. S. 312, 341; *United States v. Gill*, 87 U. S. 517. The plaintiff has not attempted to show the amount of loss resulting from separate and specific acts of the Director General but the record contains facts and figures tending to show the value of the use of plaintiff's railroad at the time it was taken. There was no known market value for the use of plaintiff's property at the time it was taken but the decision in the case of *Brooks-Scanlon Corporation* v. *the United States*,

supra, lays down the rules which it was considered should govern in an analogous situation. In that case, it will be remembered, there was involved the question of the value of certain contract rights for the building of a ship that was partially completed when requisitioned by the Government. After stating the basis upon which the claimant asserted that compensation should be determined the court said, at page 8:

'We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimants rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy.'

"It is clear from the above that the board in determining the value of the right to the use of plaintiff's property taken by the Government may not avail itself of all the facts now known that have developed since the taking, affecting favorably or unfavorably, the latter value of that use in the hands of the government but must place itself, as nearly as may be, in the position of the parties at the time of taking with the then known facts before it, including such facts and circumstances that might reasonably be foreseen would result from the then existing conditions. That this is the correct method to be followed is emphasized in a later statement by the court. At page 10 it is said:

'Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and *the then probable value at the time fixed for delivery*, the contract price, the payments made and to be made, the time to elapse before completion and delivery, *the possibility that by reason of the Government's action in costs of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance*, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking.'

"The portions of the above underscored (italicised) by us refer to elements then known or exactly determinable but which the court directs shall be considered as of the time of taking and viewed *in futuro*."

Respectfully submitted,

MARION & RYE VALLEY
RAILWAY COMPANY,
Appellant.

By BEN B. CAIN,
Attorney of Record.

"Mr. Cain: Mr. Chairman, I desire briefly to discuss this subject for the purpose of showing that what is known as the Cummins Amendment of the original Act, which has been read, was placed there for the purpose of clearly defining the announcement which is made in that amendment that the short line railroads are necessary to win the war and were included; in other words, it is an announcement contrary to the statement of the purposes of the administration made by the representatives of the administration before these committees.

"Now, the construction of the law is different. The Railroad Administration takes the position that because the proviso in Section 14 was retained in the Act that they have the right under the law to relinquish a short line, although the trunk line with which it connects may be retained under the Federal control.

"Senator Cummins: The effect of that is to absolutely nullify the amendment which was added to the bill in the Senate, as follows:

'That every railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein

defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act.'

"Mr. Cain: It seems to make the law a mockery because you grant to the short line railroads relief with one hand in the Cummins Amendment, and if the construction of the Railroad Administration is correct, you take it away with the other.

"Senator Kellogg: I had supposed that the provision at the top of page 3 meant that if a trunk line was taken over, the competitive short line must be taken over, and that the proviso in Section 14 meant that the President might release any railroad consistent with the previous provision.

"Senator Cummins: That is what it does mean, I think.

"Senator Kellogg: I do not think I voted for the Cummins Amendment; I do not remember whether I did or not; but that was the construction, I think there is no question, as I understood it.

"Senator Cummins: And that is not only, in my opinion, the spirit of the law, but it is the letter of the law as well. Now, we understand that part of it.

"Mr. Cain: Yes.

"Senator Cummins: And I think what the committee would like to hear is any additional reason that you may have for making that clearer and making it obligatory to retain the short lines if the trunk lines are retained.

"Senator Poindexter: I should like to hear, in that connection, what the Railroad Administration proposes to do, what its attitude is.

"Senator Kellogg: I was just going to ask what their construction was."

* * * * *

"Senator Watson: Would it interrupt you if I asked you a question?

"Mr. Cain: Certainly not.

"Senator Watson: What do they propose to do?

"Mr. Cain: They said—

"Senator Cummins: Will you allow me to interrupt you there for just a moment? I have read the testimony of Judge Payne before the House committee, and I assume that he states fully and accurately the position of the Director General on the subject. For the information of the committee I will try to state in a very few sentences Judge Payne's position, as taken before the House committee. He holds, first, that the Director General has the right to dismiss or relinquish any short line without regard to the trunk line connection; that is to say, he can hold the trunk line and dismiss the short line.

"Senator Watson: What does he say about this provision of the law?

"Senator Cummins: He does not say anything about that in the committee hearings. That is his holding. Secondly, he wants to retain some of the short lines probably and dismiss some of the short lines and asserts, and it is probably true, that there is not time enough between now and the

first of July to determine which of the lines he wants to retain and which of the lines he wants to relinquish. Thirdly, that as to these short lines which he desires to retain, or may desire to retain, that if the first of July comes and he has not made up his mind about it, that then he will lose a powerful influence in making his contracts with the short lines as to compensation inasmuch as he will have lost his right to relinquish them without their consent. In other words, he wants to hold over the short line the power of either retaining them or dismissing them in order to compel them to do what he calls justice to the Government with respect to the terms of retention or compensation. That is his position in the matter. I think I have fairly accurately stated it.

"Senator Watson: Did he give the committee a list of the short lines that have been taken over?

"Senator Cummins: He did not, although he said they had some short lines that had been retained. In fact, he rather considered all the short lines under Federal control, probably, under the act, and with the power left in him to dismiss them at any time before the first of July, which, of course, completely nullifies the act."

* * * * *

"Senator Myers: It is going to be the ruination of these roads if we allow the law to stand as it is. I do not see the good of adopting these resolutions. It simply gives the Government six months longer to work their ruination. It seems to me the thing to do would be to change the law.

"The Chairman: The understanding was, before this resolution was introduced, Judge Payne was before a number of the Senators, and this tentative agreement, by the short line roads, was read to him, and he indicated his willingness to accept that as a basis of taking them over, but indicated that it would be necessary to have more time in which to formulate certain contracts with these roads. He said that there would be certain modifications necessary. I recognize, as all the rest here do, that if there is to be worked a hardship and a disaster to these roads, why, the longer you put it off the worse it will be, because the law says that he must do whatever he is going to do—that is, the administration must do whatever it is going to do by the first of July, so that all roads not definitely relinquished at that time will be, *ipso facto*, under Government control, but in case the Director General absolutely relinquishes all, they would all be out from under Government control, and he could then, by their consent and his agreement, take them back. Is that not so?

"Mr. Cain: That is a mooted question.

"The Chairman: I know it is a mooted question.

"Mr. Cain: And Judge Payne was unwilling to say that they could be taken back.

"Senator Cummins: Is not the chief subject of inquiry here whether we shall make it impossible for him to relinquish all? That is the chief thing and, I think, the only thing.

"Senator Myers: This resolution would not do it.

"Senator Cummins: No; this resolution would

not do it; but I have an amendment which I propose to offer to this resolution that I think will do it. At some time or other I intend to offer this resolution when we reach that stage in the proceedings, and I may as well read it now to add to the resolution before us (reading):

'Providing, however, that the right conferred upon the President to relinquish, prior to July 1, 1918, control of all or any part of any railroad or system of transportation without the consent of the carrier, provided in Section 14 of said act, which right is here extended to July 1, 1919, shall not be construed to include any railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with the railroad or railroads of which the President has taken or retains the possession, use or control, or which connects with such railroad or is engaged as a common carrier in transportation.'

"The Chairman: That is to make it obligatory?

"Senator Cummins: That is the formal amendment.

'All such railroads as defined in said act approved March 1, 1918, as necessary for the prosecution of the war shall be entitled to the benefit of all the provisions of said act, it being the intent of Congress that every railroad not owned, controlled or operated by another carrier company and which has heretofore competed for traffic with a railroad or railroads of which the President has

taken or retains possession, use and control or which connects with such railroad and is engaged as a common carrier in general transportation shall be held and considered as within Federal control as defined in said act and be held to be necessary for the prosecution of the war and to be entitled to the benefits of all provisions of said act so long as any railroad with which it has heretofore competed for traffic or with which it connects shall remain under Federal control.'

"Then I change slightly the exception, which was in the first act:

'Provided further, that nothing in this resolution or in the said act of March 1, 1918, shall be construed as requiring the President either to take or retain the possession, use or control of any street railway, whether the same be owned, controlled or operated by another carrier company or not, nor to require the President to take or retain the possession, use or control of any interurban or other similar railroad which does not receive at least 25 per cent of its operating revenue from the transportation of freight and which prior to December 29, 1917, did not have through routes with joint rates with one or more steam road carriers.' (See Proceedings of Hearing held June 24, 1918, before the Committee on Interstate Commerce of the United States Senate, Sixty-fifth Congress, Second Session, on S. J. R. 159, beginning at page 4.)

Office Supreme Court, U. S.
FILED
DEC 14 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 315

MARION & RYE VALLEY RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

BRIEF AND ARGUMENT OF VICTOR A. REMY AS AMICUS CURIAE.

VICTOR A. REMY,
Amicus Curiae.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

	PAGES
SCOPE OF THE BRIEF	1
STATEMENT OF FACTS	2-5
The Proclamation of the President of December 26, 1917, and the announcements of the Director General	2
Appellant is a common carrier by railroad engaged in general transportation	2
Communications between the manager of appellant's road and the Railroad Administration	2, 3
Release of appellant's road from federal control and methods of operation while under such control	3, 4
Appellant's claim under Section 204 of the Transportation Act and the ruling of the Interstate Commerce Commission thereon	4
History of the proceedings taken by appellant under the Federal Control Act	4, 5
The grounds upon which the decision of the Court of Claims was based	5
SUMMARY OF ARGUMENT	6-8
The Marion & Rye Valley was under federal operation	6
The decision of the Interstate Commerce Commission in the proceedings brought under Section 204 of the Transportation Act estops the Government from contending to the contrary	7
If appellant was under federal control it is entitled to just compensation	8

PAGES

ARGUMENT 9-27

I. Appellant's road under federal control... 9-15

Appellant's road aptly described in President's Proclamation..... 9

Proclamation in accordance with Congressional authority..... 9

Under the decisions of this Court road was was federally operated..... 10-12

There need be no force employed to constitute a taking 12, 13

Question is not one of intention or of degree 13, 14

Government's contention was counter to its practice in other cases..... 14, 15

II. Government estopped by decision of Interstate Commerce Commission..... 16-19

Question involved in the proceeding before the Commission and its decision..... 16

Parties the same there as here..... 17

Rule of *res adjudicata* applies to decisions of the Commission..... 18

The Commission was exercising judicial functions 18, 19

III. Appellant entitled to just compensation.... 20-27

Findings of Court of Claims..... 20, 21

Court of Claims confused question of damages with that of compensation for use.. 21, 22

The true measure of compensation..... 23, 24

Board of Referees followed the correct measure and its award was made prima facie evidence..... 24, 25

Section 1 of the Federal Control Act affords an analogy supporting the award..... 25-27

Appendix.

	PAGES
Sections 1 and 3 of the Federal Control Act.....	1-5
Section 204 of the Transportation Act.....	5-7
Unreported opinion of the Court of Appeals for the District of Columbia in Abilene & Southern Railway v. United States.....	8-10

AUTHORITIES CITED.

PAGES

Abilene & Southern Railway v. Interstate Commerce Commission (as yet unreported but copy reproduced in appendix) 1, 18, 19
Appendix, p. 8

Bates v. Bodie, 245 U. S. 520, 526 17
Brooks-Scanlon Corporation v. United States, 265 U. S. 106 23

Congressional Debates (Cong. Rec. 56, pt. 2, p. 1944; pt. 3, pp. 2495 and 2435) 12, 26

Davis v. Dantzler, 261 U. S. 280 12
Dennison v. Payne, 293 Fed. 333 18
DuPont de Nemours Co. v. Davis, 264 U. S. 456 21

In re Deficit Settlement with the Marion & Rye Valley Railway Company, 76 I. C. C. Rep. 287 ... 16

Krichman v. United States, 256 U. S. 363 12

North Carolina Railroad v. Lee, 260 U. S. 16 ..... 15, 21

People v. Matthies, 179 N. Y. 242 18
Proclamation of the President of December 26, 1917 ..... 2, 6, 9, 11
Proclamation of the President of July 22, 1918 .... 10, 11

Riverside Oil Co. v. Hitchcock, 190 U. S. 316 19

Southern Pacific v. United States, 168 U. S. 1 17

United States v. Babcock, 250 U. S. 328 19
United States v. Fisher, 223 U. S. 683 19

Western Union Telegraph Co. v. Poston, 256 U. S. 662 ..... 10-12, 21

STATUTES.

PAGES

Act of August 29, 1916 (39 Stat. 645)..... 6, 9

Federal Control Act (40 Stat. 451).....1, 4, 14, 24, 25, 26

Appendix, pp. 1-5

Section 204 of Transportation Act (41 Stat. 460)..

.....1, 4, 16, 19

Appendix, pp. 5-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 315.

MARION & RYE VALLEY RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES.
Appellee.

BRIEF AND ARGUMENT OF VICTOR A. REMY AS AMICUS CURIAE.

The Court of Claims held that appellant cannot recover under the Federal Control Act (40 Stats. 451) because:

(a) Its railroad was not under federal control from January 1, 1918, to June 30, 1918, the period for which compensation is claimed, and

(b) If appellant's railroad was under federal control, appellant was not damaged thereby.

The facts and the arguments herein will be addressed to these questions. For the Court's convenience we have printed in our appendix hereto the pertinent portions of the Federal Control Act (Sections 1 and 3 thereof), Section 204 of the Transportation Act (41 Stat. 460), and the, as yet unreported, opinion of the Court of Appeals of the District of Columbia in *Abilene and Southern Railway* v. *Interstate Commerce Commission* (decided November 2, 1925). All of these have a bearing upon this case.

STATEMENT OF FACTS.

The case was tried on a stipulation of facts which the Court of Claims adopted as its findings of fact. We wish to supplement the statement in appellant's brief as follows:

1. On December 26, 1917, the President issued a Proclamation purporting to "take possession and assume control" of every system of transportation in the United States

> "consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation,"

and to appoint a Director General of Railroads. (Rec., 26-29.)

2. On December 29, 1917, the Director General issued an order stating that he had "taken possession and assumed control" of the railroads described in the President's Proclamation. (Rec., 31, 32.)

3. In a circular dated January 8, 1918, the Director General said that every railroad officer and employee "is now, in effect, in the service of the United States." (Rec., 33.)

4. Appellant, a Virginia corporation, a common carrier of freight and passengers, operated a railroad from Marion to Sugar Grove, Virginia, which connected with the Norfolk and Western. (Rec., 1, 35.) It received the General Orders of the Director General shown by the record. (31-35.)

5. Buchanan, manager of appellant's railroad, testified that, upon receipt of General Order 1, he wired the Director General inquiring if appellant's road was under federal control and received a reply from the Director General to obey the order. (Rec., 36.)

6. When General Order 28 of the Director General was issued, an application of appellant for a rate increase was pending before the Virginia Commission. This Commission refused to take jurisdiction, so the question was presented to officers of the Railroad Administration and the Interstate Commerce Commission. Acting under their authority, the increases named in General Order No. 28 of the Director General were but in effect. (Rec., 36.)

7. General Order 27, relating to wage increases of employees on certain railroads operated by the Government, did not name appellant but named roads on which said order was to be put into effect. This order was not applied on appellant's road. (Rec., 37.)

8. On July 3 or 4, 1918, appellant received a letter dated June 24, signed by John Barton Payne, general counsel for the Director General, which said:

> "It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question this order is issued definitely relinquishing same." (Rec., 37.)

9. The books, recording the operations of appellant's road, were kept as directed by General Order 2 issued on December 29, 1917. Appellant did not keep separate books during the period of alleged federal control. (Rec., 38.)

10. From December 28, 1917, to July 1, 1918, there was no change in the manner or method of conducting the operation of appellant's railroad; no earnings received were turned over to the United States; the same character of traffic was carried as theretofore; the road served no military camps and transported no munitions or troops; the same officials operated the railroad as formerly; they received no orders as to maintenance ex-

penditures and no specific instructions whatever from the Director General. (Rec., 39, 40.)

11. Appellant presented to the Interstate Commerce Commission a claim under Section 204 of the Transportation Act of 1920. (41 Stat. 460; Rec., 37.) This claim included amounts alleged to be due under Section 204 on account of operations from January 1, 1918, to June 30, 1918. Section 204 of the Transportation Act applies only to railroads which were not under federal operation. One of the issues before the Commission, therefore, was whether appellant's railroad was under federal operation from January 1, 1918, to June 30, 1918. On December 11, 1922, about six months before this proceeding was brought in the Court of Claims, the Commission held that, during the period involved in this present case, appellant's road was under federal control, and hence was not entitled for such period to compensation under Section 204. (Rec., 37, 38.)

12. Appellant then proceeded, in accordance with Section 3 of the Federal Control Act (40 Stats. L. 451). This section provides that claims, not adjusted by contract, shall be submitted to a board of referees provided for in said section; that said board shall report to the President the just compensation to which the carrier is entitled; that the President

> "is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated.

Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

13. The board reported (Rec., 5-22), after hearing the evidence introduced on behalf of appellant and the Government, that appellant's railroad was taken under federal control on December 28, 1917, and was relinquished on June 29, 1918 (Rec., 10); that appellant could recover just compensation for this use of its property upon the same basis as though there had been an implied lease and an agreement by the Government to pay a fair rental for such use. (Rec., 12.)

14. The Government having refused to pay the award, appellant filed its present petition in the Court of Claims, which held that appellant could not recover because:

a. The President's Proclamation was a "mere declaration of an intention to take" and did not "of itself constitute a taking of the property." (Rec., 42.)

b. No subsequent Governmental action circumscribed appellant's use of its property. (Rec., 42, 43.)

c. If the Government had control of appellant's railroad, this control was not such as would entitle appellant to compensation because

> "The just compensation to be awarded is to be measured by the loss caused to the property by the taking." (Rec., 44.)

In this brief it will be urged that the above conclusions were contrary to the facts and law.

SUMMARY OF THE ARGUMENT.

I. THE MARION & RYE VALLEY RAILWAY WAS UNDER FEDERAL CONTROL FROM JANUARY 1, 1918, TO JUNE 30, 1918.

(a) The President's Proclamation of December 26, 1917, made pursuant to the provision of the Act of August 29, 1916 (39 Stat. 645), by its terms described appellant's railroad and the Government thus assumed possession and control thereof (see *infra*, pp. 9, 10).

(b) Under the decisions of this Court, the Proclamation was not a mere declaration of an intention to take but an actual taking (see *infra*, pp. 10-12.)

(c) Any contention to the contrary leads to the conclusion, that, to constitute a taking, the owner must be ousted by force or something akin thereto and, hence, such an argument, if carried to its logical end, would result in the absurdity that no railroad was taken under federal control (*infra*, pp. 12-14).

(d) The United States, by making settlements with other railroads for the period here involved, has admitted that the President's Proclamation had the legal result of placing such roads under federal operation. As far as this question is concerned, there is no distinction whatsoever between the roads, with which such settlements were made, and appellant's (*infra*, pp. 14, 15).

II. THE UNITED STATES IS ESTOPPED BY THE ADJUDICATION OF THE INTERSTATE COMMERCE COMMISSION IN ITS SETTLEMENT WITH APPELLANT UNDER SECTION 204 OF THE TRANSPORTATION ACT (41 STAT. 460) FROM ASSERTING THAT APPELLANT'S ROAD WAS NOT UNDER FEDERAL OPERATION.

(a) To pass upon appellant's claim under Section 204, the Interstate Commerce Commission had to decide whether appellant's railroad was under federal operation from January 1, 1918, to June 30, 1918. It specifically held that the railroad was under federal operation during said period (*infra*, p. 16.)

(b) The Interstate Commerce Commission thus adjudicated one of the questions at issue here, contrary to the Government's present contention (*infra*, pp. 16, 17).

(c) The Government, as well as appellant, was a party to the proceeding before the Commission (*infra*, p. 17.)

(d) The rule, estopping a party from relitigating a fact judicially established, applies to decisions of public officers and boards in the exercise of judicial functions (*infra*, pp. 17, 18).

(e) The Commission in deciding that appellant's road was under federal operation was exercising a judicial function (*infra*, pp. 18, 19).

III. IF APPELLANT WAS UNDER FEDERAL OPERATION IT IS ENTITLED TO JUST COMPENSATION.

(a) There are no findings of fact of the Court of Claims which could require a contrary conclusion (*infra*, pp. 20-22).

(b) The net income, which was turned over to appellant, instead of to the United States, affords no criterion of just compensation. What the properties earned after the taking is not the true test of just compensation (*infra*, pp. 22, 23).

(c) The true test is the sum that would probably have resulted from fair negotiations prior to the taking (*infra*, pp. 23, 24).

(d) The fact that appellant, without objection on the part of the Government, retained the net income cannot change the rule for measuring just compensation (*infra*, pp. 23, 24).

(e) The Board of Referees in their award followed the true rule of measurement and, this being so, the question of just compensation was one of fact only (*infra*, p. 24).

(f) The report of the Referees was prima facie evidence as to the amount just compensation and there was no evidence before, or finding by, the Court of Claims showing that this amount was erroneous (*infra*, pp. 24, 25).

(h) Congress, when it enacted the Federal Control Act, endeavored to prescribe a method of arriving at a sum which would afford just compensation; and it provided that such compensation should be based upon past earnings. This analogy supports the award of the Board of Referees and is contrary to the holding of the Court of Claims (*infra*, pp. 25-27).

ARGUMENT.

I.

ACCORDING TO THE DECISIONS OF THIS COURT, THE MARION & RYE VALLEY'S RAILROAD WAS TAKEN UNDER FEDERAL CONTROL.

It cannot be fairly claimed, certainly the Court of Claims did not so hold, that appellant was not included in the Proclamation of the President, for that proclamation embraced

> "each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation."

Appellant's railroad is located wholly within the United States. The Court of Claims found that appellant

> "was engaged in business as a common carrier of freight and passengers for hire, operating a line of railroad * * *." (Rec., 36, 1.)

This is descriptive of a railroad engaged in general transportation and there is no finding *contra*. So we may assume that the question, as to whether appellant was engaged in general transportation, is not in issue here.†

† We also assume it will not be seriously claimed that the President had no power to incide in his Proclamation appellant's railroad. While counsel for the Railroad Administration stated before a Congressional Committee that no short line could be taken under federal control, if unnecessary for war uses (see Appellant's brief, p. 27), the Act of August 29, 1916 (39 Stat. 645) contains no such limitation. It provides that the President may take possession

"of any system or systems of transportation, or any part thereof," and may utilize them to the exclusion of all other traffic for any needful or desirable purpose connected with the emergency. Manifestly, under this act, the President could assume control of any railroad, the only limitation being that the road should not be utilized "to the exclusion * * * of all other traffic thereon," except "for purposes connected with the emergency."

Apparently, the chief reason for the holding below was the court's conclusion that the proclamation was a declaration of an intention to take and not a taking.* But this runs directly counter to this Court's holdings. In addition to the cases cited in appellant's brief, the Court's attention is invited to the following authorities:

Western Union Telegraph Co. v. *Poston* (256 U. S. 662, 666) arose on certiorari to review a state Supreme Court's judgment, rendered against the Telegraph Company, because it failed promptly to deliver a telegram sent on October 2, 1918. The defense was that the Telegraph Company's properties had been taken under federal control by the President's Proclamation of July 22, 1918, and hence the Company was not operating the business on October 2, 1918. This Court, in holding that the Telegraph Company was not liable because it was not operating the properties, said that by the Proclamation of July 22nd,

> "the President took possession of and operated the telegraph systems * * *. The companies were not made the operating agents of the United States. The officers of the companies were to operate the properties for the United States and it was to be done 'in the names of their respective companies.' "

---

* We presume this conclusion was based upon the following:

(a) Though the proclamation was issued on December 26, 1917, it states that control and possession is assumed December 28, 1917, and that "such possession," etc., "hereby by me undertaken shall be exercised by and through William G. McAdoo."

(b) The presumption in which the Court of Claims indulged that

"If no other step had been taken, and no agent of the President had done anything to carry into effect the proclamation of the President, it would certainly not have been regarded as a taking of property." (43)

If it be conceded, contrary to what this Court has held, that the foregoing is correct, yet it would seem that such a concession could not be controlling on the outcome of this appeal, for these reasons: On December 28 and again on December 29, 1917, the Director General announced that he had possession of the roads described in the President's proclamation. (Rec., 31, 32.) These were no mere declarations of intention but admissions of a controlling fact—namely, that possession and control had been assumed by the Government. The act of the Director General was the act of the United States, to the same extent as an act of the President.

How controlling that decision is here, can be demonstrated by comparing the pertinent portions of the Proclamation of December 26, 1917 (relating to railroads) with those of July 22, 1918 (relating to telegraphs and telephones) as follows:

THE PROCLAMATION OF DECEMBER 26, 1917. (REC., 28, 29.)

"I, * * * do hereby * * * take possession, and assume control at twelve o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads * * *

Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies. * * *

From and after twelve o'clock on the said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. * * *"

THE PROCLAMATION OF JULY 22, 1918. (SEE 256 U. S., pp. 664. 665.)

"I, * * * do hereby take possession and assume control * * * of each and every telegraph and telephone system and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies. * * *

Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies * * *.

From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice. * * *"

If, as held in *Western Union Telegraph Co.* v. *Poston*, the Proclamation of July 22nd, constituted a taking of the telegraph and telephone systems and made the United States the operator thereof, then the Proclamation of December 26, 1917, constituted a taking of the railroads and made the United States the operator of them. And the fact that such operation was to be conducted by the former officers of the companies did not, as was ex-

pressly held in the *Poston* case, make the legal situation differ from that which would have resulted if the United States employed an entirely new set of officers and employees.*

This has been conceded by the Government in other cases. Thus, in *Davis* v. *Dantzler* (261 U. S. 280, 284), the Director General, who represented the United States as fully there as the Department of Justice represents it in the present case, in the answer averred:

> "that on December 26, 1917, the President by proclamation issued in pursuance of law, took possession of the railroad transportation systems of the United States."**

In *Krichman* v. *United States* (256 U. S. 363), the court said (p. 365):

> "The statutes and executive orders concerning railroads are stated in *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135. By the statute of August 29, 1916, § 1, c. 418, 39 Stat. 645, the President was given power to take possession and assume control of the transportation systems of the country. After the declarations of war with Germany (April 6, 1917) and Austria (December 7, 1917), the President issued a proclamation of December 26, 1917, *taking possession of the transportation systems within the boundaries of the United States.*"

Any argument that the Proclamation was not a taking, not only runs counter to the foregoing decisions, but

---

* Indeed, the debates in Congress clearly show that there was never any intention to operate the railroads except through their former officers and employees. Senator Nelson summed up the situation (Cong. Rec., 56, Part 3, p. 2495) in these words:

> "The President will operate these railroads through the officials and employees and operating forces of the different railroads. Manifestly we do not intend that he shall create an operating force of his own. He will give directions to these roads to operate in such and such a manner."

** This is manifestly wholly inconsistent with the contention now made that the Proclamation of December 26 was a mere declaration of an intention. It may perhaps be pertinent to inquire whether the Government may, with good grace, on a fundamental question like this, shift its position to escape liability in accordance with the exigencies of each particular case.

leads to the conclusion that, to constitute a taking, there must be physical action, which deprives the owner of his property by force, or by something akin thereto. For if the Proclamation did not deprive the owners of the use of their railroads, no announcement, whether by proclamation, or by heralds, could do so. There can be no midway station between a proclamation, purporting to assume control and possession of the roads, and a taking of possession through the exclusion of the owners by duress—which would have been as unnecessary as it was impractical. Since in no instance was force employed, or anything akin thereto, the Government's contention and the conclusion of the Court of Claims prove too much for, if true, no railroad was ever under federal control.

While, we believe, that the foregoing is a fair criticism of the Government's position, the Government may here claim that the question must be determined by the intention of the parties as disclosed by their later acts. A sufficient answer to this contention is, that, since it is undisputed that the President's Proclamation was issued, the sole question is as to its legal effect, and what was later done could not alter the legal status established by that Proclamation. Therefore, whether the Director General, or the railroad's management, thought that appellant's road was under federal control, would appear to be merely a matter of legal conjecture. But, however this may be, it is clear that both parties deemed the road under federal control immediately after the Proclamation was issued, for orders were sent to the railroad, and its management was specifically directed to obey these orders. (Rec., 36.) There was not a scintilla of evidence that this was done through inadvertence. To argue that some roads were under federal control because they received a large number of orders from the Director General, which changed the

methods of their prior operation, and that other roads were not under federal control, because they received few orders and these did not change their operating methods, is unsound. It is like saying that, whether a man was a soldier, would depend, not upon whether he was inducted into the army, but upon the number and kinds of orders he received thereafter. Had the appellant's road not been under federal control, no order of the Director General could bind it, and the Director General would have no authority to issue any order to it.

Moreover, it is a matter of common knowledge, that, in the most instances, the Government has settled with the owners of the railroads, and that such settlements covered the period from January 1, 1918, to June 30, 1918. It is true that usually these settlements were made in accordance with contracts, between the Director General and the owners of the railroads, entered into pursuant to the Federal Control Act, which was enacted March 21, 1918. But whether a contract was made with a railroad company affords no test as to whether the railroad was under federal control, as Section 3 of the Federal Control Act itself recognizes. Nor could the Director General contract to pay just compensation to a road for a period during which it was not under federal control. So that these roads, with which settlements were made, must have been taken under federal control at some particular time prior to January 1, 1918, and by some specific act. There is no possible distinction between the act which brought the roads, with which such settlements have been made, under federal control, and the act which brought appellant's road under federal control. The President's Proclamation, the letter of the Director General of December 28, 1917 (Rec., 31) and Orders Nos. 1 and 2 of the Director General, dated December 29, 1917, were the only govern-

mental acts relating to the subject which occurred prior to January 1, 1918. (Rec., 31, 32.) The next communications were issued January 5, 1918 (see Bulletin 4 of the Railroad Administration, pp. 99, 146), and these have nothing to do with the assumption of control. The sole distinction, between the treatment accorded to roads like appellant's and the roads with whom settlements have been made, is that the latter received certain orders, issued some weeks after the Proclamation, which appellant's road did not receive.* But if any weight is to be attached to this fact, it must be argued that it was by virtue of these subsequent orders that federal control was assumed. The Government's own actions refute such an argument, since it settled with these roads, not from the date of such subsequent orders, but from the date fixed by the Proclamation.

The contention that appellant was not taken under federal control, therefore, is contrary to the decisions of this Court; it leads to absurd and illogical consequences; it is opposed to the practice of the Government in other cases.

---

* Some stress seems to have been laid upon the fact that appellant's road was not mentioned in Order No. 27, issued May 25, 1918, which related to wage increases. (Rec., 37.) But, aside from what has previously been said, it is manifest that this has no bearing upon the question at issue. General Order 27 did not name, or purport to name, all the roads under federal control. By a supplemental order, dated July 3, 1918 (after appellant's road had been released from federal control) several hundred carriers were named to whom the order was made applicable, that were not named in the original order of May 25th (United States Railroad Administration Bulletin No. 4, pp. 198-202, 221-226). Further, in *North Carolina Railroad Co.* v. *Lee* (260 U. S. 16, 17) this Court held that the North Carolina Railroad had been taken under federal control. This railroad was not named in either Order No. 27 or in the supplement thereto.

II.

THE GOVERNMENT IS ESTOPPED BY THE ADJUDICATION OF THE INTERSTATE COMMERCE COMMISSION FROM CLAIMING THAT APPELLANT'S ROAD WAS NOT UNDER FEDERAL CONTROL.

While we believe that what has heretofore been said amply demonstrates that appellant's road was taken under federal control, we suggest that this case might be safely rested upon a different principle than any heretofore mentioned.

As heretofore stated (*supra*, p. 4) appellant presented a claim to the Interstate Commerce Commission under Section 204 of the Transportation Act. The claim included a demand for compensation from January 1, 1918, to June 30, 1918—the same period for which compensation is claimed in the instant proceeding. Under the terms of Section 204 the compensation therein provided for, could only be paid to a carrier for such period as "its railroad or systems of transportation was not under federal operation." (See Appendix, pp. 5, 6.) Therefore, whether appellant's road was under federal operation from January 1, 1918, to June 30, 1918, was a necessary issue in the proceeding before the Commission. On December 11, 1922, some six months before the present action was started in the Court of Claims, the Commission decided that appellant's railroad was under federal control and operation from January 1, 1918, to June 30, 1918, and hence was not entitled to the benefits of Section 204 during such period. (Rec., 37.)

> *In re Deficit Settlement with the Marion & Rye Valley Railway Company*, 76 I. C. C. Reports 287.

This decision, according to the rule which prohibits parties from later relitigating a fact that was in issue

and decided by a competent tribunal, estops the Government from contending that appellant's road was not operated by the United States during the period in question.

While the claim before the Interstate Commerce Commission was founded upon the Transportation Act, whereas here it is predicated upon the Federal Control Act, this difference is not controlling upon the question now under consideration, for the test is not whether the proceedings were based upon the same cause of action.

Bates v. *Bodie*, 245 U. S. 520, 526.
Southern Pacific v. *United States*, 168 U. S. 1, 48.

The parties to both proceedings are identical, unless it can be said that the United States was not a party to the one before the Commission. But, we believe that the Commission, itself, represented the United States in that proceeding just as completely as the Land Department does in contests relating to public land. Under Section 204 the Commission was acting as a claim board. In passing upon and auditing the claims of the carriers under Section 204, the Commission necessarily was the representative of the United States. Upon its certificate the Secretary of the Treasury was obligated to pay; he was given no discretion in the matter. Mandamus would lie if he refused. The Commission's decision was thus binding upon the Secretary of Treasury and hence upon the United States. Since no one can be bound by a proceeding to which he is not a party, it follows that the United States was necessarily a party to proceeding before the Commission under Section 204.

It may, however, be urged that, granting all this, the Commission's decision could not, upon any recognized principle of *res adjudicata*, estop the Government here, because the Commission is not a court. But the test is whether the decision involved the performance of a judicial function—not the title of the performer. The rule, forbidding collateral attacks on matters judicially

determined, applies to the judicial and quasi-judicial acts of public officers and boards exactly as it does to the judgments of courts of general jurisdiction.

Dennison v. *Payne,* 293 Fed. 333, 341 (C. C. A., 2nd Cir.),

In *People* v. *Matthies,* 179 N. Y. 242 (72 N. E. 103), it appeared that the Board of Town Auditors of White Plains was authorized by statute to examine and decide claims presented against the town. After the board had rejected a certain claim, a mandamus proceeding was brought. The Court of Appeals said:

> "The determination of the town auditors by which they decided that the claim presented by the relators was not a valid claim against the town and should be rejected was a judicial determination, and is conclusive until reversed or modified in proceedings by certiorari."

After stating that the court could not dictate the judgment of the board, it added that

> "the rule of *res adjudicata* applies to all judicial determinations * * *."

In the instant case, the principal question before the Court of Claims was whether appellant's road was under federal control from January 1, 1918, to June 30, 1918. In deciding that question in the negative the Court of Claims was exercising a judicial function—indeed its judgment is based on such decision. It follows, that when the Commission decided this self-same question in the affirmative, some six months before the present action was brought, it also was acting judicially.

The very recent case of *Abilene & Southern Railway Company* v. *Interstate Commerce Commission* (a copy of which we print in the appendix hereto), decided by the Court of Appeals of the District of Columbia on November 2, 1925, is apt upon this point. There, it appeared

that the Abilene & Southern Railway presented its claim to the Interstate Commerce Commission under Section 204 of the Transportation Act and included in its claim the period from January 1, 1918, to July 1, 1918. The Commission held that the railway was under federal control during said period and therefore was not entitled to compensation under Section 204 of the Transportation Act—precisely as it held in the case of the claim which appellant filed. The Abilene & Southern brought a mandamus suit in the District Court to compel the Commission to ascertain the deficit of the railway's operating income under Section 204 for the period in question. The District Court denied the writ and the railway appealed. In affirming the District Court, the Court of Appeals said:

> "The statute here under consideration provides for the payment of a deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. This duty imposed upon the Commission is judicial in character, calling for a determination not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto.* This, we think, calls for more than a mere ministerial act to be performed by the Commission by express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of mandamus."

The opinion of the Court of Appeals is directly in accord with the principles laid down by the decisions by this Court in

Riverside Oil Co. v. *Hitchcock,* 190 U. S. 316, 324.

United States ex rel. Ness v. *Fisher,* 223 U. S. 683, 692.

---

* We suggest, though possibly the consideration of this question is not material upon this appeal, that Section 204 makes the Commission the exclusive judge of both the law and the facts as to any claims presented thereunder. The section does not provide for any method of reviewing the Commission's decision. It creates a special right and remedy against the United States. It seems thus to fall within the principle stated in *United States* v. *Babcock* (250 U. S. 328, 331).

III.

THE APPELLANT IS ENTITLED TO JUST COMPENSATION.

The Court of Claims said (Rec., 45):

> "that the alleged taking of the plaintiff's property did not disturb it in the use and control of its property, nor did it restrict the right of the plaintiff to dispose of it, nor did it cause the plaintiff any pecuniary loss. So if the technical control of the plaintiff's property by the United States caused it to lose nothing, no award of compensation can in justice be made."

We have carefully examined the Court's findings to see if they support this conclusion. The only ones bearing upon it are as follows:

(1) That appellant did not turn over any of its earnings to the United States (Rec., 39);

(2) That the same officials operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior thereto (Rec., 39);

(3) That during said period there was no change in the manner or method of conducting the operation of said railroad (Rec., 39);

(4) That the Company received no orders with reference to the expenditures of money for maintaining its road or as to how it should be operated or maintained, other than those mentioned in the record* (Rec., 39);

The point at issue is whether, assuming that appellant's road was under federal operation, it is entitled to

---

* There is the further finding that appellant from December 28, 1918, to June 29, 1919, continued to operate its road as it had always operated it. (Rec., 40.) The period involved in this proceeding is from January 1, 1918, to June 30, 1918. Therefore, how, or by whom, the railroad was operated from December 28, 1918, to June 29, 1919, is clearly irrelevant. The words "from December 28, 1918, to June 29, 1919," cannot be a mere typographical error, which should read "from December 28, 1917, to June 29, 1918," for the findings of the lower Court were based upon a stipulation of facts. It cannot be assumed that in a proceeding based upon the premise that the United States was operating the railroad from January 1, 1918, to June 30, 1918, counsel would stipulate that, not the United States, but appellant, operated said road from December 28, 1917, to June 29, 1918.

compensation. Therefore, the above findings must be construed with the legal fact that the road was under federal control. So construed, they amount merely to this: The United States operated the road through the same persons who had theretofore operated it.** All operating expenses were incurred on behalf of the Government and all moneys collected belonged to the Government. As said in *Du Pont de Nemours Co.* v. *Davis* (264 U. S. 456, 462):

> "Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. Sec. 12, 40 Stat. 457."

When the road was released from federal control, the persons in charge turned the net operating income over to the Marion & Rye Valley instead of to the United States. The persons operating the road received no instructions from the Director General other than those shown by the record and they conducted operations in the same manner as theretofore.

The above in nowise precludes appellant from recovering just compensation. If the Government, during the period in question, was operating appellant's road "under a right in the nature of eminent domain,"* it follows that appellant is entitled to just compensation because of the deprivation of its right to use its road. The right to just compensation cannot depend upon whether the persons, who conducted the operations of the road, received orders which resulted in damage to the property, in reducing the income, or in increasing the expenses. A contrary contention or conclusion confuses

** In *Western Union Telegraph Co.* v. *Poston* (256 U. S. 662, 668), the Court held that the properties of the Telegraph Company were under federal operation, though such properties were managed and operated by the former managers and employees of the Western Union and in the name of that Company (see *supra*, p. 10).

* *North Carolina Railroad Co.* v. *Lee* (260 U. S. 16, 17).

the question of damages to property with the question of just compensation for the use of property. It is evident that this is precisely what the Court of Claims did, for it said (Rec., 44):

> "The just compensation to be awarded is to be measured by the losses caused to the property by the taking. * * *
>
> If any loss was incurred during that time, it was the result of the plaintiff's own operation and control of its own property, * * *"

and that the alleged taking did not disturb appellant's use of its property, "nor did it restrict its right to dispose of it," nor cause any pecuniary loss (see *supra*, p. 20).

Manifestly, the foregoing shows, that the Court of Claims never really assumed that appellant's road was under federal operation. The latter part of its opinion purports to make this assumption and then to decide that, even so, appellant is not entitled to just compensation. But if appellant's road was operated by the United States, then it was not operated by appellant; appellant's use of its property was not only disturbed but destroyed, and appellant's right to dispose of its road was limited to the sale of a mere reversion. Therefore, we submit, that the opinion of the Court of Claims upon this branch of the case is hopelessly wrong, since, though purporting to proceed upon the assumption that appellant's road was under federal control, it in fact proceeds upon the contrary assumption.

We presume, however, it will be claimed that the findings, summarized (*supra*, p. 20) show that the net income of the road from January 1, 1918, to June 30, 1918, accurately measures the compensation to which appellant is entitled, and that, since this net income was retained, appellant has already received all the compensation to which it is entitled by reason of the Government's use of

its road. In other words, that appellant has received as much as it would have received if its road had never been taken under federal control, and consequently has not been damaged by said control. But had the net income been turned over to the Government, instead of to appellant, it is manifest from the decisions that such net income would not afford a true measure of just compensation. What is actually earned by properties after their taking is no criterion of the value of their use at the time of such taking. We believe *Brooks-Scanlon Corporation* v. *United States* (265 U. S. 106) is conclusive upon this point. There, it was argued that just compensation for the expropriation of a contract to build a ship was the value of said ship when completed, less the contract price. But this Court said (p. 123):

> "We think it is not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's right thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

It further said (p. 125):

> "Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have *their value at the time of the taking.*"

If, as held in the *Brooks-Scanlon* case, the measure of just compensation is the value of the right at the time of the taking, then what the road actually earned while under federal control can afford no test of just compensation. And this is true whether the net income was turned over to the United States or was turned over to appellant. The fact that appellant has, without objec-

tion on the part of the United States, retained this net income cannot change the rule for the admeasurement of just compensation.

The measure of compensation in this case is the value of the use of the properties, plus a sum equivalent to any deterioration that may have occurred from the time of their taking to the time of their restitution, less such sum as the appellant holds which belongs to the United States—the net income earned during the period that appellant's road was operated by the United States. The value of the use of the properties is the estimated value of such use at the time of the taking. It is

> "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

This is precisely the test adopted by the Board of Referees (Rec., 12, 13.) Once the correct measure is determined, the question of just compensation becomes one of fact only. Section 3 of the Federal Control Act (see Appendix, pp. 4, 5) provides that

> "the report of said referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated."

This means that, since the Board of Referees adopted the correct rule of measurement, its finding as to the amount of compensation should stand, unless the evidence before the Court of Claims showed that said amount was erroneous. But the findings of the Court of Claims as to past earnings (Rec., 40, 41) sustain rather than refute the finding of the Board. Aside from this, there was no evidence before, or findings of, the Court of Claims bearing on the subject, except the road's earnings while under federal control which, as we have seen, are immaterial.

The evidence taken before the Board of Referees is

not part of the record here and therefore it may be presumed that such evidence amply supported the Board's findings. Nor will it do to say that the report itself shows that the sole evidence was the past earnings of the road. It is true that the report states that there

> "is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental." (Rec. 12.)

But though the Board said that, therefore, the rental value

> "must be based largely on the evidence before us of plaintiff's earning power prior to December 28, 1917" (Rec., 13),

it also said that it must consider

> "evidence of conditions existing December 28, 1917, which might then have been reasonably expected to affect future revenues and expenses of a railroad." (Rec., 13.)

and that it would give weight in its conclusions to

> "the then known conditions and, in addition, such as might be reasonably foreseen by reasonably intelligent business men."

In view of the provisions of the statute, upon what theory can an award, based upon such evidence, and arrived at by such reasoning, be fairly set aside? In negotiations between an owner, who is willing to sell, and a purchaser, who desires to buy, the future earnings of the property are necessarily unknown. In the case of a railroad lease, there is no market value, and the negotiations necessarily have to be based upon past earnings, present conditions, and inferences as to future conditions.

When Congress enacted the Federal Control Act, it sought to provide a means to avoid litigation of this nature by prescribing the form of contract, which should be made between the Government and the railroads.

Manifestly, Congress endeavored to prescribe in that contract a method of arriving at a sum which would afford just compensation to the railroad owners on account of the use of their roads by the Government.* Had Congress prescribed more than what would amount to just compensation, it would have done an injustice to the taxpayers of the country; had it prescribed less, it would have done injustice to the railroad owners. Under the cardinal canons of construction no such unjust intentions can be attributed to the legislature. Therefore, Section 1 of the Federal Control Act represents the deliberate judgment of Congress, after having had the benefit of extended hearings and debate, as to the best method of determining just compensation. And by Section 1 the basis of determining just compensation was to take the average railroad earnings for the three years ending June 30, 1917.

While what constitutes just compensation is a judicial question, yet Congress, in enacting Section 1 of the Federal Control Act, endeavored, as practical men of affairs, to determine a concrete method of arriving at the sum, which would in all probability result from negotiations between an owner who was willing to sell the use of its railroad and a purchaser who was desirous of

---

* This is amply proved by the Congressional Debates:

Senator Smith, Chairman of the Committee on Interstate Commerce, said:

"This basis of compensation is made to enable the President to enter into an agreement with the roads in lieu of all their lawful and constitutional rights, thereby avoiding the delays and difficulties that would necessarily result from attempting to ascertain what would be just compensation by due process of law." (Cong. Rec., Vol. 56, Part 2, p. 1944.)

Senator Underwood said:

"Now, the issue before us at this time is in relation to the attempt on the part of Congress, responding to a request by the President of the United States, to provide the machinery by which the President can make agreements with the railroads as to what is just compensation, without forcing them to go to the courts to have the courts determine what the amount shall be." (Cong. Rec., Vol. 56, Part 3, p. 2435.)

buying such use for an indefinite period. Further, Congress started to consider this question immediately after the Government had taken possession of the railroads. Therefore, its judgment, as to the proper method of valuation, probably closely approximated that, which negotiators would have employed immediately before Government control of the roads was assumed. Consequently, the Federal Control Act itself affords a cogent analogy in support of the Board of Referees' award and against the judgment of the Court of Claims.

The judgment of the Court of Claims works a practical discrimination. As is well known, the Government has paid compensation to a large number of roads under the terms of Section 1 of the Federal Control Act. Should compensation be denied appellant, the result would be discriminatory.

VICTOR A. REMY,
Amicus Curiae.

APPENDIX.

PORTIONS OF THE FEDERAL CONTROL ACT PERTINENT TO THIS APPEAL (40 STAT. 451 ET SEQ.).

SEC. 1. That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so ac-

quired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenue derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it

in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which

the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

SECTION 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpoena the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, corporation, part-

nership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

SECTION 204 OF THE TRANSPORTATION ACT (41 STAT. 460 ET SEQ.).

REIMBURSEMENT OF DEFICITS DURING FEDERAL CONTROL.

SEC. 204. (a) When used in this section—

The term "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation;

but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term "test period" means the three years ending June 30, 1917.

(b) For the purposes of this section—

Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any, (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together, (hereinafter called "test period return"): *Provided*, That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Fed-

eral control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) For every such month the Commission shall then ascertain (1) the differene between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computation shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

OPINION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN ABILENE & SOUTHERN RAILWAY V. INTERSTATE COMMERCE COMMISSION.

Abilene & Southern Ry. Co.
vs.
Interstate Commerce Commission. } No. 4330.

VAN ORSDEL: Appellant railway company appeals from a judgment of the Supreme Court of the District of Columbia denying a writ of mandamus appellee, Interstate Commerce Commission, to require it to "ascertain the facts and to perform the duties required of it by section 204 of the Transportation Act, 1920; specifically, to ascertain the amount of the deficit in its railway operating income for the period from January 1, 1918 to July 1, 1918, during which the relator operated its own railroad or system of transportation, and to certify to the Secretary of the Treasury the amount payable to it under said section."

Section 204 of the Transportation Act of Feb. 28, 1920 (41 Stat. 456) among other things provided that any such railroad "which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic or connected with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation," could, on application to the Interstate Commerce Commission for the amount of the deficit sustained during the said period, have the same ascertained and determined. The duty was then imposed upon the Commission of certifying to the Secretary of the Treasury the amount so found payable to the carrier; when a warrant would be drawn in favor of the carrier upon the Treasury of the United States for the amount so certified.

The question here involved is whether or not the appellant railway company, during the period from January 1, 1918, to July 1, 1918, was under Federal control. If it was not, it has been denied the right to have the

amount of the deficit sustained by it during that period ascertained and determined by the Commission and the amount so found certified to the Secretary of the Treasury for payment.

When the case came on for hearing before the Interstate Commerce Commission it was heard upon the petition and exhibits, consisting of the Presidential proclamation of December 26th, 1917, taking over the railways and transportation lines as a war emergency, the agreement dated March 25, 1919 between appellant company and the Director General of Railroads, the rule to show cause, the answer of the Interstate Commerce Commission, the traverse to said answer, certain evidence taken at the hearing consisting of a transcript of hearings held December 1, 1922 and January 11, 1923 before the Interstate Commerce Commission, with certain exhibits introduced at the hearing and reports of the Commission. After full hearing and argument, the Commission held that appellant railway company was under Federal control during the period above stated, and that it could not claim compensation for deficit under section 204 of the Transportation Act.

Counsel for appellant, in their brief, assert that "jurisdiction of the court to issue the writ of mandamus as prayed for, was admitted by the pleadings." Jurisdiction cannot be conferred upon the court by admissions, stipulation or otherwise. Where a jurisdictional matter is involved it is the duty of the court to consider first, and determine whether there is authority to proceed. The statute here under consideration provides for the payment of a deficit to railroads not under Federal control. The deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. This duty imposed upon the Commission is judicial in character, calling for a determination not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto. This, we think, calls for more than a mere ministerial act to be performed by the Commission by express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of mandamus. To determine the matters raised by this appellant, this court is called upon to review the proceedings had before the

Interstate Commerce Commission and to determine whether or not error has been committed. To thus review the case in the present proceedings would amount to a conversion of the writ of mandamus into a writ of error. This, it has been universally held, cannot be done.

Decided November 2, 1925.

CONTENTS

PAGE

Act authorizing President to pay short lines guaranty specified should be construed as mandatory..... 25

Amount of Compensation..... 22

Apparent basis of Court's decision..... 2

Basis of Lower Court's Decision Untenable..... 3

Compensation for property taken..... 11

Congress cannot delegate its power to make laws..... 24

Congress cannot delegate power to recognize moral or honorary claims..... 23

Congress expressly recognized the rights of the courts ultimately to determine amount of compensation..... 17

Congress has power to authorize the President to enter into contractual relations with the carriers..... 18

Congress has the right to recognize moral or honorary as well as legal obligations..... 19

Does the court hold that the guaranty provisions of the Federal Control and Transportation acts are unconstitutional? 16

Effect of Court's decision that plaintiff's' property has not been taken 8

Express terms of statutory guaranty..... 27
- Appeal from decision of Board..... 39
- Carriers extended, to what..... 27
- Fact finding commission created..... 29
- Guaranty, The 27
- Just Compensation defined 28
- Written agreements not necessary..... 35

Far Reaching Effect of Court's decision in Instant Case.. 33

PAGE

Government's contention contrary to weight of authority.. 7

Intent of the Congress to extend the benefits of the Federal Control Act to roads not actually operated by the Director General clearly shown by subsequent legislation.. 14

In the exercise of eminent domain the taking of private property is a legislative, not a judicial, function..... 5

Interest of Cripple Creek and Colorado Springs Railroad Company 2

President's decision and method of operation not reviewable by the courts 6

Ratification by Congress of the President's proclamation.. 12

Status of Proceedings 1

Summary of Material Facts 4

True nature of the Case..... 3

Cases Cited

PAGE

Abilene & Southern Ry. v. Interstate Commerce Commission—(53 W. L. R. 806) 34
Adirondack R. Co. v. N. Y., 176 U. S. 336 8
Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 5
Backus, Jr. & Sons v. Ft. Street Union Depot Co., 169 U. S. 557 8
Bragg v. Weaver, 251 U. S. 57 ..... 5, 8
Chappell v. U. S., 160 U. S. 499 5
Chase, v. U. S., 261 Fed. 833, 256 U. S. 1 25
Cincinnati, etc. Ry. v. Com. Clinton Co., 1 Oh. St. Rep. 778 24
Field v. Clark, 143 U. S. 649 24
Forbes v. U. S. (C.C.A.), 268 Fed. 273 5
Guthrie Natl. Bank v. Guthrie,—173 U. S. 528 23
Livingston v. Tanner, 14 N. H. 64 26
Mason *et al.* v. Fearson, 9 How. 248 ..... 25, 26
Mayor of New York v. Furze, 3 Hill (N.Y.) 612 26
Minor, *et al.* v. Mech. Bank of Alexandria, 1 Pet. 46 26
Mississippi and R. R. Boom Co. v. Patterson, 98 U. S. 403 8
Monongahela Nav. Co. v. U. S., 148 U. S. 312 ..... 5, 18
P. de Ronde & Co., Inc. v. U. S. Sugar Equalization Board, Inc., 299 Fed. 659 ..... 23, 25
Ralston v. Crittenden (C.C.), 13 Fed. 508 26
Sears v. Akron, 246 U. S. 242 8
St. L. & S. W. Ry. v. Ark., 235 U. S. 350 25
Shoemaker v. U. S., 147 U. S. 282 5
Supervisors, etc. v. U. S., 4 Wall. 435 ..... 25, 26
Town of Guilford v. Supervisors, etc., 13 N. Y. 143 23
Union Bridge Co. v. U. S., 204 U. S. 364 5
United States v. Cornell Seamboat Co., 137 Fed. 455, 202 U. S. 184 25
United States v. Forbes (D. C.), 259 Fed. 585 5
United States v. Gettysburg, E. Ry., 160 U. S. 668 5
United States v. Realty Co., 163 U. S. 427 ..... 19, 23

Statutes Cited

PAGE

Act of August 29, 1916, (39 S. L. 645) 4

Federal Control Act (40 S. L. 451)

Section 1 13

Section 3 ..... 1, 29

Section 14 14

Transportation Act, 1920 (41 S. L. 456) 1

Sec. 204 (a), (41 S. L. 460) 15

Other Citations

Corpus Juris, Vol. 20, page 624 8

Cyclopedia Law & Procedure, Vol. 15, page 63 7

House Majority Report, No. 294, accompanying H.R. 9685 ..... 17, 21

President's proclamation 4, 6, 12

President's Statement 9, 28

Senate, Minority, Report, part 2, No. 356 20

IN THE

Supreme Court of the United States

October Term, 1925.

MARION & RYE VALLEY RAILROAD CO., *Appellant*
vs.
UNITED STATES GOVERNMENT, *Appellee*
No. 315

BRIEF FILED ON BEHALF OF THE CRIPPLE CREEK AND COLORADO SPRINGS RAILROAD COMPANY, IN THE RELATION OF *AMICUS CURIÆ*

STATUS OF PROCEEDINGS

This case, as described in the opinion of the lower court (rendered May 26, 1924) is "a suit to recover the sum of $14,425.94, the amount of an award made by a Board of Referees duly appointed by the Interstate Commerce Commission under Section 3 of the Federal Control Act (40 S. L. 451) and the Transportation Act 1920 (41 S. L. 456) as the just compensation to the plaintiff for the alleged taking and use of its railroad property by the United States for the period beginning December 28, 1917, and ended June 29, 1918. The Director General of Railroads having refused to accept the report of the Board of Referees as a basis of settlement the plaintiff filed its petition in this court as provided by law." (R. p. 42.)

The petition was dismissed by the court. The court after

reviewing the facts in the case, summarized its conclusions in the following language: (R. p. 44.)

> "All of the provisions of the statutes which look to compensation of owners of railroad properties could only apply to properties which were taken possession of by the government and actually operated and controlled by it. * * * We think that the property of the plaintiff was not taken by the government. If there was technical control of the property by the government it was of such a character that it would not cause any loss to the plaintiff and does not justify the award of any compensation."

The plaintiff filed a motion for a new trial and upon rehearing the court affirmed its former decision in an opinion rendered January 25, 1925.

INTEREST OF THE CRIPPLE CREEK & COLORADO SPRINGS RAILROAD COMPANY

The Cripple Creek & Colorado Springs Railroad Company has asked leave to file this brief in the relation of *amicus curiæ* because it has pending in the Court of Claims a somewhat similar case which may be affected by the court's decision in this case. While the facts in the two cases are not necessarily nor admittedly identical the same principles of law are involved in both cases.

APPARENT BASIS OF COURT'S DECISION

The lower court's decision is apparently based upon the assumption that this is a suit for damages sustained as a result of the alleged taking of plaintiff's property for a public use. The court finds that plaintiff has failed to show that its property was actually taken. In reaching this conclusion it has apparently adopted the view of government's counsel that plaintiff must not only show that the President by proclamation and order took over the control of its railroad but that the President or the Director General as his agent actually operated such railroad.

In other words, the method of utilization of the property involved is apparently treated as the determining factor in reaching a conclusion on the point whether or not the property was actually taken over.

BASIS OF LOWER COURT'S DECISION UNTENABLE

With all due deference we feel that this view is based upon an erroneous premise. While we do not, of course, deny that in a suit for damages sustained as a result of the exercise of the right of eminent domain the burden is on the plaintiff to show that its property has been taken, we submit that this burden was met in the instant case when it was shown to the court that the President by proclamation and order had taken over the possession, use and control of the properties involved and had placed them under the control of the Director General of Railroads. That it is not within the purview of the court to question the President's method of taking or of utilizing the property involved. Its sole province in such case is to determine the amount of compensation to which plaintiff is entitled. We further submit that under the statutes here involved the plaintiff is entitled to the compensation claimed whether or not its properties were taken over by the Director General.

TRUE NATURE OF THE CASE

We further suggest to the court that the claim of plaintiff against the United States is not, strictly speaking, a claim for damages sustained by reason of the taking of its property for a public use under the right of eminent domain but is a statutory claim for compensation guaranteed to it by the Congress which plaintiff has the option to assert as a substitute for the ordinary claim for damages to which it would be entitled under the Constitution.

SUMMARY OF MATERIAL FACTS

Adverting briefly to the facts in the case, the record shows that by a proclamation of the President promulgated December 26, 1917, effective December 28, 1917, under authority of an act of Congress approved August 29, 1916 (39 S. L. 645), the President took possession and assumed control, *inter alia*:

> "* * * of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads * * *, including also terminals * * * and all other equipment and appurtenances commonly used upon and operated as a part of such rail or combined rail and water systems of transportation." (R. p. 28.)

This language of the proclamation clearly and unequivocally covers the property of the plaintiff. The act of Congress under which this proclamation was issued, so far as applicable, reads as follows:

> "The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, equipment, and for such other purposes connected with the emergency as may be needful or desirable." (Sec. 1, Act Aug. 29, 1916, 39 S. L. 645.)

The obvious purpose of this provision was to vest in the President a discretion to determine when a necessity existed for taking over the transportation systems of the United States as a war measure and the power to assume control of and operate such systems in such manner as he deemed advisable. It can hardly be denied that this is ordinarily a legislative rather than an administrative power. It is not a judicial function.

IN THE EXERCISE OF EMINENT DOMAIN THE TAKING OF PRIVATE PROPERTY IS A LEGISLATIVE NOT A JUDICIAL FUNCTION

The usual rule in such cases is very clearly stated in a note to *Alabama Power Company v. Gulf Power Company, et al.* (283 Fed. 606) as follows:

> "The rule is usually stated to be that where property is sought to be taken or condemned for a public use whether such property is necessary to that end *is a legislative question* and the determination thereof by the authorized legislative body can not be questioned in a proceeding to take or condemn the property. *Shoemaker v. U. S.*, 147 U. S. 282, 37 L. ed. 170; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 37 L. ed. 463; *U. S. v. Gettysburg, E. Ry.*, 160 U. S. 668, 40 L. ed. 576. And a hearing on the question of necessity is not essential to due process of law demanded by the Fourteenth Amendment. *Bragg v. Weaver*, 251 U. S. 57, 40 Supr. Ct. 62, 64 L. ed. 135. The general rule is modified to the extent that, when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be probably without reasonable foundation. Justice Peckham in *U. S. v. Gettysburg*, E. Co., 160 U. S. 668, 40 L. ed. 576." (Italics ours.)

While this is the general rule, as pointed out in the same foot note:

> "The power to determine the question of necessity for public use may be delegated by Congress to executive officials, and their findings on this question in the exercise of such delegated power *is not subject to review by the courts. Chappell v. U. S.*, 160 U. S. 499, 40 L. ed. 510; *Union Bridge Co. v. U. S.*, 204 U. S. 364, 51 L. ed. 523; *Forbes v. U. S.* (CCA) 268 Fed. 273; *U. S. v. Forbes* (DC) 259 Fed. 585."

PRESIDENT'S DECISION AND METHOD OF OPERATION NOT REVIEWABLE BY THE COURTS

The Congress having delegated to the President the power to determine when any necessity existed for taking over the railroad systems of transportation under the exercise of the right of eminent domain and the power to assume control of and operate such systems, and the President, in the exercise of these powers, having determined that such necessity did exist and having placed in the Director General of Railroads the supervision and control of the properties so taken over, it is respectfully submitted that it is not within the province of the courts to review his action to determine whether such necessity existed or to question his method of operating the properties so taken over.

The President's proclamation provided that: (R. p. 28.)

> "It is hereby directed that the possession, control, operation and utilization of such transportation systems *hereby by me undertaken,* shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, *so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employees of said systems of transportation.* Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the name of their respective companies." (Italics ours.)

Under his language it seems clear that from the effective date of this proclamation the possession, control and utilization of all transportation systems were taken over by the United States. Obviously the Director General could not, over night, perfect an organization for the operation of several thousand miles of railroads in the United States owned by several hundred

different companies, and as a purely practical question it became and was necessary to utilize as agencies of the Government for the purpose of operating these systems of transportation, the existing railroad organizations. We respectfully submit that the possession and control in legal effect was as complete while these roads were operated for the United States by their own officers, directors and employees as when other officers, directors and employees were substituted therefor. The mere change of title, for example, of a president or general manager to that of "Regional Director" or "Director in Charge of Operation," did not change his legal status. He was the agent of the Government before as well as after such change. We submit, therefore, that the taking of these properties was more than technical; it was an actual taking from the effective date of the proclamation.

THE GOVERNMENT'S CONTENTION CONTRARY TO WEIGHT OF AUTHORITY

The Government apparently assumes that it is inherently within the province of the courts to determine what constitutes a taking of property and that this question is to be determined in the last analysis by the use actually made of property alleged to have been taken.

In dealing with this question in the lower court counsel for the Government in their brief stated:

> "The question of whether possession had been taken of any particular railroad or class of railroads was a judicial one, not a legislative one. Congress could not direct the court as to how such judicial question should be decided any more than it could direct the court as to the measure of damages for a taking of private property under the power of eminent domain."

As we have before suggested, this theory seems to us to be contrary to a long line of court decisions. For a collection of cases on this point see 15 *Cyc.* 630 where the rule is stated to be as follows:

> "In the absence of some constitutional or statutory pro-

vision to the contrary the necessity and expediency of exercising the right of eminent domain are questions essentially political and not judicial in their character. The determination of these questions belong to the sovereign power; the legislative determination is final and conclusive, and the courts have no power to review it. It rests with the legislature not only to determine when the power of eminent domain may be exercised, but also the *character, quality, method, and extent* of such exercise. And this power is unqualified other than by the necessity of providing that compensation shall be made." (Italics ours.)

The same rule with additional cases in support thereof is set forth in 20 *Corpus Juris* 624.

In the recent case of *Bragg v. Weaver* (251 U. S. 58) this Court in discussing the question of condemnation, speaking through Mr. Justice Van Devanter, said:

> "Where the intended use is public the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. *They are legislative questions no matter who may be charged with their decision* and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." (Citing *Miss. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *A. Backus, Jr. & Sons v. Ft. Street Union Depot Co.*, 169 U. S. 557, 48 L. ed. 853; *Adirondack R. Co. v. New York*, 176 U. S. 336, 44 L. ed. 492; *Sears v. Akron*, 246 U. S. 242, 62 L. ed. 688.) (Italics ours.)

It will be observed that according to the authorities referred to the Congress has the right to determine not only when and under what circumstances property may be taken but it may also prescribe "the mode, conditions and agencies" for the exercise of the right of eminent domain and the "character, quality, method and extent" of such exercise.

EFFECT OF LOWER COURT'S DECISION THAT PLAINTIFF'S PROPERTY HAS NOT BEEN TAKEN

Applying these principles to the instant case, let us consider the effect of the lower court's decision when it held that there

had been no taking of the properties here involved. It can not be denied that Congress in the exercise of its constitutional power authorized the President to take over the transportation systems of the United States when he deemed it necessary as a war measure. The President, who was authorized to determine when such necessity existed, made a record of his decision in the usual and appropriate manner, that is, by proclamation and order. The language of the proclamation is unequivocal. After reciting the authority under which he acted and after designating the Director General of Railroads as the agency to supervise and control the management of such roads, and after outlining the procedure to be followed pending the organization of such agency, the proclamation states: (R. p. 29.)

> "From and after twelve o'clock on said 28th day of December, 1917, all transportation systems included within this order and proclamation shall *conclusively* be deemed within the possession and control of said Director General *without further act or notice.* But for the purpose of accounting said possession and control shall date from twelve o'clock on December 31, 1917." (Italics ours.)

This proclamation and order are dated December 26, 1917. On the same date the President gave out a statement in which he said: (R. p. 30.)

> "I have exercised the powers over the transportation systems of the country which were granted me by the act of Congress of last August because it has become imperatively necessary for me to do so."

It will be noted that in this statement he refers to the fact that he has exercised the power in question. He does not state that he will exercise this power at some future date.

It would be difficult if not impossible to record in language more free from ambiguity the decision that the President was authorized to make and did make under the act of Congress here involved. And yet the court is asked by the Government in effect to treat this proclamation as a legal nullity on the theory that some

further act was necessary to complete the taking of the property involved. In discussing this question before the lower court counsel for the Government in their brief stated: (R. p. 16.)

> "The proclamation did not purport to take possession of any railroad in *presenti*, but rather constituted an announcement that possession would be taken in the future—an announcement that might or might not be fulfilled. The proclamation was dated December 26, 1917, and while using words of present import, announced the taking possession of the systems of transportation therein described in the future; to wit, at twelve o'clock noon, December 28, 1917, two days thereafter. We need not argue that the President did not on the 26th day of December take possession of the railroads at 12 o'clock noon, two days later. The proclamation was therefore but an anonuncement of an intention to take possession of such railroads two days subsequent to the announcement thereof, an intention that might or might not be carried into effect, or that might be carried into effect as to some railroads and abandoned as to others."

With all due deference we find it difficult to understand upon what theory this interpretation is placed upon the language used by the President. The proclamation came into effect as of the date specified therein. As stated its terms are unequivocal. The mere fact that it was prepared and dated two days prior to the effective date certainly can not be said to invalidate it. It provided in express terms that no further act or notice shall be necessary to complete the taking of the properties involved. But notwithstanding this the Government's counsel stated in their brief in the lower court that:

> "The proclamation of the President was very broad in its terms and if the action of the President and his agents, following the issuance thereof in dealing with plaintiff's railroad had been in harmony therewith, we would not be insisting on the foregoing contention."

The contention referred to was that the President had not by his proclamation taken posession of the railroad in question.

We are here dealing with an executive order and proclamation of the President. By analogy let us assume that in an equity

suit the court should issue an order on December 26 restraining and enjoining the defendant from going on certain premises or from taking some other action from and after December 28 at 12 o'clock noon. Would this be treated merely as an announcement, on the part of the court, of an intention at some future date to issue an injunction? We hardly think that such a position could be sustained and we submit that the same principle is here involved.

Under these circumstances we respectfully suggest that the effect of the decision in holding that the proclamation did not constitute a taking is to substitute the court's discretion for that vested in the President by the Congress. The President in no uncertain terms states in his proclamation that the taking of the properties involved shall be complete without any further notice or action. The lower court held that further action was necessary to complete the taking of the property though it did not specify nor undertake to show what further action was necessary.

COMPENSATION FOR PROPERTY TAKEN

While the right to determine when private property may be taken for public use is a legislative right, the power to determine the question of damages or compensation to be paid to the owner of such property is unquestionably vested in the courts. It needs no citation of authority for the proposition that it is not within the power of Congress by statute to limit the amount of compensation to be paid to the owner of private property taken for a public use. The due process of law clause in the Constitution clearly vests this power in the courts. Recognizing this well-established principle of law and apparently realizing that the adjudication of this question (where properties of such enormous value located throughout the United States were involved) would necessarily consume a long period of time and would throw a stupendous burden on the courts of this country, as a substitute or rather as an alternative for this procedure under the Constitution, the Director General was

directed by the President to seek to reach an agreement with the various railroads involved on this question of compensation. The proclamation on this point contains the following provisions: (R. p. 29.)

> "The Director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.
>
> "But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed."

It was thus made clear that while the Director General was authorized to enter into negotiations with the carriers and to agree upon compensation, this authority was not intended by the President as an attempt on his part to impair their constitutional right to have the question of compensation due them adjudicated in a court of competent jurisdiction. It was merely an alternative remedy given to the carrier.

RATIFICATION BY CONGRESS OF THE PRESIDENT'S PROCLAMATION

As we have seen, under the clear and unambiguous language of the President's proclamation, the possession, use and control of all railroads in the United States was taken over by the President on December 28, 1917. By an act of Congress, approved March 21, 1918 (40 S. L. 451) commonly known as the Federal Control Act, nearly four months thereafter, the action of the President

in authorizing the Director General to enter into agreements as to compensation with the carriers in effect was confirmed and ratified by Congress. This act act provided, *inter alia:*

> "Sec. 1. That the President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads and systems of transportation (called herein "carriers"), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission that during the period of such Federal control it shall receive as just compensation an annual sum payable from time to time in reasonable instalments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum, equivalent as nearly as may be, to its average annual railway operating income for the three years ended June 30, 1917."

Presumably to remove any doubt as to what roads had been taken over and were under Federal control as a result of the President's proclamation, there was incorporated in this same section of the Federal Control Act, the following provision:

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this act."

This language, like that of the proclamation, is free from ambiguity and extends the benefits of the Federal Control Act not only to those roads that were actually operated by the Director General but to those competing with or connecting with such roads. This being true, while we contend that for the period here involved the plaintiff was actually under Federal control and that its property had been actually taken over by the Government, under the language of the act it is immaterial whether

or not it was actually operated by the Director General so long as it competed with or connected with a railroad under Federal control.

INTENT OF THE CONGRESS TO EXTEND THE BENEFITS OF THE FEDERAL CONTROL ACT TO ROADS NOT ACTUALLY OPERATED BY THE DIRECTOR GENERAL CLEARLY SHOWN BY SUBSEQUENT LEGISLATION

It was unquestionably the purpose of the Congress to extend the benefits of the Federal Control Act to connecting and competing carriers whether or not their physical operations were directed and controlled by the Director General. This view is confirmed by the action of the Congress in incorporating section 204 in the Transportation Act, 1920.

Section 14 of the Federal Control Act provides:

> "Section 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace; *PROVIDED HOWEVER*, That the President may, prior to July 1, 1918, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. *No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.*" (Italics ours.)

Apparently realizing that the concluding paragraph of this section to the effect that "no right to compensation shall accrue to such railroads from and after the date of relinquishment for

the property so relinquished" operated as an injustice to those owners to whom properties were returned for operation in competition with railroads operated by the government, by a later act of the Congress known as the Transportation Act, 1920 (Sec. 204 a, 41 S. L. 460) approved February 28, 1920, this provision was repealed and express provision was made for reimbursement of deficits sustained for the remainder of the period of Federal control by those carriers which had been released from Federal control by the Director General and a method was prescribed for determining the difference in the average railway operating income of such carriers as between the remainder of the Federal control period and the corresponding months of the three year period ended June 30, 1917, described as the "test period."

In the instant case we are not concerned with the guaranty provided by the Transportation Act, 1920, since the claim here involved is for compensation for that period of Federal control which preceded the date of relinquishment (*i. e.*, January 1 to June 30, 1918) for which period section 1 of the Federal Control Act authorized the President to guarantee to carriers that they shall receive from the operation of their properties a sum equivalent as nearly as may be to the average railway operating income for the corresponding period of the test period, *i. e.*, for the three year period ended June 30, 1917.

It thus appears that the Congress by the enactment of statutes under which these proceedings are had, has expressly recognized the fact that the transportation systems of the United States had been taken over and has expressly prescribed the compensation to which the owners are entitled if accepted in lieu of adjudicated compensation for damages sustained. And yet the lower court has held that because these properties were not managed in some other manner not specified or because the President or the Director General did not take some further or different action, the taking was incomplete and connecting or competing carriers are not entitled to the guaranty of Congress.

DOES THE COURT OF CLAIMS HOLD THAT THE GUARANTY PROVISIONS OF THE FEDERAL CONTROL AND TRANSPORTATION ACTS ARE UNCONSTITUTIONAL?

In dealing with the question of compensation guaranteed by Congress in its opinion the court says: (R. p. 44)

> "The plaintiff insists that both the President and the Congress provided for the compensation to which the railroads under Federal control would be entitled, the President in his Proclamation and the Congress by the act of February 28, 1920, 41 Stat. 456, and the act of March 21, 1918, 40 Stat. 541. Without going into the method of compensation set out in the statutes it is sufficient to say that the question of compensation is a judicial question, and just compensation must be determined by the evidence produced before the court. The court is not bound in its findings as to what is just compensation to adopt the method of ascertaining it which may be suggested by the statute. The just compensation to be awarded is to be measured by the loss caused to the property by the taking."

From this it appears that the lower court classifies the guaranty provision of the Federal Control and Transportation Acts as an attempt on the part of Congress to usurp powers that are inherently judicial. The opinion leaves us wondering whether it was the intention of the lower court to declare unconstitutional those provisions of these acts which prescribe the amount of compensation to be paid to the railroad companies for the temporary use of their properties. We assume, of course, that this was not the court's intention since such a decision would necessarily have a far-reaching effect, the Government, through the Director General and the Interstate Commerce Commission, having already made settlements with the railroad companies under these provisions which involve many millions of dollars. This being a matter of public record and a fact of which the lower court would necessarily take judicial notice, if its decision was intended to invalidate these set-

tlements this subject would, of course, have been expressly dealt with in the court's opinion.

The question then remains, if these provisions are not treated as invalid, what effect is to be given them? The opinion deals with them as a "suggested method of settlement" which is not binding on the court. On this point the lower court, as we have seen, says: (R. p. 44)

> "The court is not bound in its findings as to what is just compensation to adopt the method of ascertaining it which may be suggested by the statute."

It is, of course, true that the adjudication of the amount of compensation or damages to which the owner of property becomes entitled when it is taken for a public use is a judicial and not a legislative function, but the Congress has not deprived nor attempted to deprive the owner of the property of the right to have this question adjudicated by the courts.

CONGRESS EXPRESSLY RECOGNIZED THE RIGHT OF THE COURT ULTIMATELY TO DETERMINE AMOUNT OF COMPENSATION

As we have already seen the President in his proclamation fully recognized the inherent power of the court to finally determine the amount of compensation to which the carriers became entitled by reason of the taking of their properties. The report of the committee to which this bill was referred by the House shows clearly that the Congress likewise recognized this inherent right of the courts and did not attempt to invade it but merely offered the carrier *an alternative method* of settlement. The report states:

> "The act of August 29, 1916, authorized the President in time of war to assume the possession, control and use of transportation systems. It provided no method for determining the just compensation of the owners of properties thus applied to public use. The right to just compensation is a constitutional right; *the determination of the amount of just compensation is a judicial and not a legislative question.*

"But Congress may and should provide speedy and easily available judicial machinery for determining this just compensation. (*Monongahela Nav. Co. v. U. S.*, 148 U. S. 312.) It is also desirable that the owners of the property should, *instead of being required to resort to the courts for their rights, be made such offers for just compensation as will* probably result in an agreement between them and the United States determinative of their rights. * * * Section 1 is a fundamentally important section; for it sets the outside limits of the expected agreement. *Its sole function is to provide a basis of just and proper agreements as may eliminate litigation.*" (Italics ours.) Report No. 294, accompanying H. R. 9685, 65th Cong., 2d Sess., Feb. 9, 1918.)

It is clear, therefore, that this method of settlement was offered by the Congress as an *alternative method* for that of settlement by litigation and was not intended to deprive the owner of his rights to litigation.

THE CONGRESS HAD POWER TO AUTHORIZE THE PRESIDENT TO ENTER INTO CONTRACTUAL RELATIONS WITH THE CARRIERS

It will no doubt be conceded that the Congress had power, after authorizing the President to take over the transportation systems of the United States, to give him authority to agree with the carriers as to the amount of compensation which should be paid for the temporary use of their properties provided such amount did not exceed the limits prescribed by Congress. In this view we take it that the lower court's decision is to the effect that those carriers whose lines were actually taken over and operated by the President could by agreement determine the amount of compensation to be paid, but the short lines whose properties were not in the opinion of the lower court actually taken over and operated did not become entitled to the benefits of the act.

While we contend and have endeavored to show that plaintiff's properties were taken over by the United States and that it

thereby became entitled to the compensation guaranteed by the Congress, we submit that even if this court should decide that there was no actual taking of plaintiff's property, plaintiff is nevertheless entitled to the amount of compensation prescribed by the Federal Control Act.

CONGRESS HAS THE RIGHT TO RECOGNIZE MORAL OR HONORARY AS WELL AS LEGAL OBLIGATIONS

Let us assume for the purpose of argument that the properties of plaintiff were not taken over and were never operated by the Government and that notwithstanding this fact the Congress guaranteed to the plaintiff that its operating income during the Federal control period should be equal to its average operating income for the corresponding period of the test period. If so construed the question arises, Was it within the power of Congress to authorize such a guarantee?

It is well settled that the Congress has the power to recognize and to provide for the payment of claims against the government which could obtain no recognition in a court of law but which grew out of general principles of right and justice and are based solely upon considerations of a moral or honorary nature. *U. S. v. Realty Co.*, 163 U. S. 427, 441-443.

In the instant case it is clear that the guaranty provided by the Federal Control Act is extended to "every railroad not owned, controlled or operated by another carrier company and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use and control or which connects with such railroad and is engaged as a common carrier in general transportation." It can hardly be denied that the appellant comes within this language of the act as a connecting carrier of a road operated by the President and under the language of the act is entitled to the benefits thereof. The reason for extending the benefits of the act to such carriers is clearly shown in the minority report of the committee to which

Senate bill 3751 was referred. The Senate bill as first reported out apparently made no provision for the guaranty of compensation to the so-called short lines. The minority report in dealing with this question states:

> "It is obvious that there are a large number of short line roads which will not be affected by government operation, and as to these nothing is said; but on the other hand, there are a large number of comparatively short roads which compete with the trunk lines for traffic, and these roads will be absolutely destroyed if some arrangement is not made for their protection. While in a sense their operation by the government may not be necessary for the successful conduct of the war, they have all been built to give the communities which they serve relief from the monopoly of the trunk lines. The welfare of the localities through which they pass is dependent upon their existence and public life demands their full and complete operation. If their relations with the trunk lines are destroyed by the diversion of traffic which they have heretofore carried the outcome is perfectly clear. When the war ends and the big systems are restored these small, independent, competitive roads will fall into the hands of the great systems for substantially nothing. It is probable that if these roads were taken over the liability which the government assumes would not be materially, if at all, increased, but even if it is enhanced by a small amount, the government can well afford to take something from the excessive compensation which it proposes to guarantee to the big roads in order to save some of the little ones." (Minority report No. 356, Senate, 65th Cong., 2d Sess. Part 2. 2/11/18.)

The bill as finally enacted included the provision above referred to which extended to competing and connecting short lines substantially the same guaranty that was extended to lines actually operated. This may be regarded as a moral or honorary obligation which the Congress clearly had the right to recognize.

The court can and should take judicial notice of the fact that the government's control of traffic on the trunk lines and its consequent diversion from normal channels necessarily

deprived the short lines of some of the revenues normally earned. That this was true in the instant case is shown by the fact that the appellant's operating income during this period was less than the average operating income throughout the test period.

Counsel for the Government in their brief in the lower court described the test period as a period

> "When confessedly the conditions were entirely dissimilar to those involved during the time in controversy and when carriers generally were enjoying a prosperity without parallel before or since."

We agree that the conditions during the Federal control period differed from conditions during the test period and it was because this difference was inevitable that the Congress saw fit to guarantee the short lines against the necessarily resultant loss. We can not agree, however, with the statement of government's counsel that during the test period the carriers generally enjoyed a prosperity without parallel before or since. On this point the report of the committee in dealing with section 1 (which prescribes the compensation to be paid to carriers) states:

> "Its sole function is to provide a basis of just and proper agreements as may eliminate litigation. * * * Naturally there has been much discussion as to the justice of the proposed settlements. Your committee has dealt with this practice as a practical question. * * * The facts are that these companies have, during this three year period (referring to the test period) had certain earnings; that they are entitled as a constitutional right to have their just compensation adjudicated by the courts; that it is probable—almost certain—that any court would take their average earnings for some reasonable period as persuasive, perhaps conclusive, of such compensation. Viewing their constitutional right in connection with the great public need for stabilizing the security market—of restoring impaired confidence—your committee are of the opinion that the average earnings of three years is a fair basis for settlement of the rights of most of these owners against their government and ought to be approved.

21

1915 was one of the worst years in recent railroad history; the other two years were prosperous years. The average of the three years is, therefore, a fair test of earning power. Moreover, the investment in the properties of railroads now taken over has been increased at the rate of about $375,000,000 a year. The properties the government now has the use of are larger by about $1,000,000,000 than the properties that made the earnings of 1915 taken as one of the three years in order to reach the standard return." (Italics ours.)

So long as we treat this guarantee of compensation to the short lines as the recognition of a moral or honorary obligation of the government, it is hardly necessary to consider whether or not the amount guaranteed is excessive since this was purely a question for the Congress to determine. It is hardly fair to the carriers, however, to state that the entire test period was a period of unprecedented prosperity when the Congress had found upon investigation of the subject that one year at least of the test period was one of the worst in recent railroad history.

AMOUNT OF COMPENSATION

While we have no interest in the amount of the award in this particular case, we are interested in the principle to be followed by the court in determining the amount of compensation if any and respectfully suggest that where a carrier exercises the option of asserting its claim provided by section 1 of the Federal Control Act it is entitled to the amount the President is authorized by that statute to guarantee to such carrier. The position of the Government is, of course, that the President is vested with the widest possible discretion in determining the amount that may be guaranteed. This may be true where the settlement is made by agreement between a carrier whose properties were taken over and operated and the settlement is of a legal obligation. A different situation results, however, where the guaranty of the Congress is the recognition of a moral or honorary obli-

gation. While we contend that in either case the act should be construed as requiring the President to settle with all carriers on the same basis, we suggest to the court that this is especially true where the guaranty is based upon a moral or honorary obligation.

As stated by the court in the case of *United States vs. Realty Company, (supra)* when speaking of moral or honorary claims against the government:

> "Their recognition depends solely upon Congress and whether it will recognize claims thus founded must be left to the discretion of that body."

And again, in dealing with the same subject, the court said (p. 440):

> "To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof."

CONGRESS CAN NOT DELEGATE POWER TO RECOGNIZE MORAL OR HONORARY CLAIMS

It is thus clear that the recognition of moral claims against the government is solely a congressional power and in the exercise of that power the Congress alone can determine what claims shall be recognized and paid. It can not delegate to an administrative body an absolute discretion to recognize such claims but can, of course, prescribe the conditions under which such claims may be recognized and paid and vest in an administrative body or official the right to determine when the facts bring it within the class of cases that have been recognized. *Guthrie National Bank v. Guthrie,* 173 U. S. 528; *U. S. v. Realty Co.,* 163 U. S. 427; *Town of Guilford v. Supervisors, etc.,* 13 N. Y. 143; *P. deRonde & Co., Inc., v. U. S. Sugar Equalization Board, Inc.,* 299 Fed. 659.

Applying these principles to the case at bar it is clear that Congress has extended to carriers connecting or competing with

railroads under the control and operation of the Government a guaranty that their earnings shall be equal to the average net earnings during the test period, and has delegated to the executive branch of the government the power to determine (a) which are connecting or competing carriers and (b) the difference between such carriers' operating income during the two periods involved.

The Congress could not vest in the executive branch of the government an arbitrary discretion to determine which roads should receive and which should not receive such guaranty since this would involve a delegation of its power to recognize moral or honorary obligations which power is vested solely in the Congress. Such delegation would clearly be a delegation of the full legislative power and discretion with respect to the payment of such claims and would hence be invalid. *Field v. Clark,* 143 U. S. 649, 692-694.

CONGRESS CAN NOT DELEGATE ITS POWER TO MAKE LAWS

While the Congress can not, of course, delegate its power to make a law, it can, as stated in *Field v. Clark* (*supra*):

> "Make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."

In defining this distinction the case of *Cincinnati, etc. Ry. Co. v. Commissioners of Clinton Co.,* 1 Ohio State Reports, 778, is quoted from as follows:

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made."

If we are correct in our view the statutes here involved, if treated as a recognition of a moral or honorary obligation, must be declared unconstitutional if they are construed

as vesting an absolute discretion in the President. This being true they should not be so construed if any other construction is possible. It hardly needs any citation of authority for the proposition that where one construction necessitates declaring an act unconstitutional it should not be adopted if any other construction is possible which would not lead to this result. As stated by Mr. Justice Pitney, in *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 59 L. ed. 265:

> "No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."

ACT AUTHORIZING PRESIDENT TO PAY SHORT LINES GUARANTY SPECIFIED SHOULD BE CONSTRUED AS MANDATORY

It is at once apparent that if the power vested in the President to pay the short lines the guaranty provided by statute is treated as mandatory and not merely permissive no necessity exists for declaring these acts unconstitutional. It has been held with great uniformity that what a public officer is empowered by Congress to do for others and it is beneficial for them to have done, the law holds that he ought to do, and that in such instances the language used by the legislature, though permissive in form, is in fact peremptory. *Supervisors, etc. v. U. S.*, 4 Wall. 435; *Mason, et. al. v. Fearson*, 9 How. 248; *U. S. v. Cornell Steamboat Co.*, 137 Fed. 455, affirmed in 202 U. S. 184; *P. de Ronde & Co., Inc., v. U. S. Sugar Equalization Board, Inc.*, 299 Fed. 659. In such statutes the word "authorize" has many times been held to mean "direct." In *Chase v. United States*, 261 Fed. 833, affirmed in 256 U. S. 1, the court (p. 837) said:

"An examination of the legislation of Congress shows that in many of the acts of Congress the word 'authorize' is frequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word 'authorize' the other words 'in his discretion' are added. As was said by the Supreme Court of the United States in *Mason et al. v. Fearson*, 9 How. 248, 13 L. ed. 125:

" 'Whenever it is provided that a corporation or officer, "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons. * * * * Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty'." *Mayor of New York v. Furze*, 3 Hill (N.Y.) 612; *Minor et al. v. Mechanics Bank of Alexandria*, 1 Pet. 46, 7 L. ed. 47, and note; *Livingston v. Tanner*, 14 N. H. 64; *Ralston v. Crittenden* (C.C.) 13 Fed. 508; *Supervisors Rock Island Co. v. U. S.*, 4 Wall. 435, 18 L. ed. 419.

Applying these principles to the instant case we submit that appellant is entitled to the difference between the operating income during the period of Federal control involved and its average operating income during the corresponding months of the test peroid. That the power vested in the President and the Board of Referees is to determine, first, whether plaintiff is under Federal control or is a connecting or competing carrier; in other words, whether the plaintiff is entitled to the benefits of Section 1 of the Federal Control Act; second, what constitutes the deficit sustained within the meaning of the act here involved.

EXPRESS TERMS OF STATUTORY GUARANTY

TO WHAT CARRIERS EXTENDED

As we have already seen, in defining carriers entitled to the benefits of the Federal Control Act, Congress expressly provides: (Sec. 1)

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefits of all the provisions of this act; *PROVIDED HOWEVER*, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both."

It can hardly be denied that under the terms of this provision of the act plaintiff is entitled to its benefits.

THE GUARANTY

Section 1 of the Federal Control Act, so far as applicable to the issue here involved, further provides:

> "That the President, having in time of war taken over the possession, use, control and operation (called herein 'Federal control') of certain railroads and systems of transportation (called herein 'carriers'), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable instalments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent *as nearly as may be* to its average annual railway operating income for the three years ended June 30, 1917." (Italics ours.)

Inasmuch as the appellant is entitled to the benefits of this act under the language of that part of section 1 first above quoted and since it made operating returns to the Interstate Commerce Commission, it is clear that the President was authorized to guarantee the operating income specified and that the appellant is entitled to a settlement on the same basis as other carriers under Federal control.

JUST COMPENSATION DEFINED

Before considering other provisions involved, the court's attention is especially directed to the language used by the Congress in that part of Section 1 just above quoted to the effect that the President may guarantee to any carrier entitled to the benefits of the act that "it shall receive *as just compensation* an annual sum * * * not exceeding a sum equivalent, *as nearly as may be,* to its annual railway operating income for the three years ended June 30, 1917." (Italics ours.) In other words, the Congress specifically defines the term "just compensation" as used throughout the statute as a sum equivalent as nearly as may be to the average annual railway operating income for the three years ended June 30, 1917.

Attention is also directed to the statement of the President when he took over the railroad systems of the country (R. p. 30) wherein he said:

> Immediately upon the reassembling of Congress I shall recommend that these definite guaranties be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government, and second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the government must now use under its own direction or else suffer serious embarrassment.

In the consideration of these statutes it is important to bear this in mind. In the discussion which follows we shall refer to the difference between the railway operating income of the plaintiff as between the test and Federal control periods as the "statutory just compensation" since the Congress has given to these words this specific meaning.

Fact Finding Commission Created

Section 3 provides in part:

> "That all claims for just compensation not adjusted (as provided in section 1) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington * * *. Said boards shall give full hearings to such carriers and to the United States, shall consider all the facts and circumstances and shall report as soon as practicable in each to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section 1. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized in section 1. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

We respectfully suggest to the court that the sole purpose

and effect of this section, in so far as it relates to the Board of Referees, was to create a board for the purpose of determining by investigation the true facts in the case where the President or the Director General and the carrier failed to agree upon the facts. This Board was not and could not have been intended by Congress to perform the functions of a court and to adjudicate the question of compensation due the owner for the taking of its private property.

As we have seen, the Congress had prescribed as just compensation for each carrier entitled to the benefits of the act a sum equivalent *as nearly as may be* to its annual railway operating income for the corresponding months of the test period. In asserting its claim for this amount under the guaranty prescribed by the Congress, it was, of course, necessary for the carrier to credit the government with the amount of net operating income actually received and its claim for "statutory just compensation" is, therefore, limited to the difference betwen its railway operating income as between the two periods involved.

Opinions might well differ as to the amount that represented this difference. Many complex questions of accounting are necessarily involved. Differences in cost of labor and materials as between the two periods must be adjusted or equated. Expenditures made during each period must be classified as operating or maintenance expenses or as capital expenditures. Items charged to depreciation must be considered and the Congress obviously assumed that the President and the carrier might reasonably disagree as to the amount that represented the difference in railway operating income as between the two periods.

In the case of such disagreement or failure to agree the carrier was not required under the act to abandon its claim for the "statutory just compensation" guaranteed to it and to sue for damages for the taking of its property but the procedure outlined in section 3 was manifestly incorporated so as to make it possible for the carrier to have determined by an authorized fact finding commission, acting in the

capacity of an arbitration board, the "statutory just compensation" guaranteed to it.

It will be observed that this board is not authorized to determine what is a just or reasonable or fair compensation, but after investigation it was required to report to the President "the just compensation," that is, the compensation prescribed by Congress. That this was the intention of the Congress is clearly shown by the context and by the history of this legislation to which reference has already been made.

It is at once obvious that if the Congress intended the carrier to be deprived of its right to claim the "statutory just compensation" in the event of disagreement with the President it would have been unnecessary to create the Board of Referees, since upon abandonment of this right it could assert its claim under section 3 by suit in the Court of Claims.

If we assume that Congress intended by the creation of this board to vest in it power to adopt some measure of damages other than that prescribed by Congress or in the exercise of an arbitrary and absolute discretion to determine what in its opinion constituted a fair, reasonable or just compensation, the conclusion would seem to be justified that Congress intended to vest in said board powers inherently vested in the courts. While Congress may, of course, establish inferior courts, when established their powers are derived from the constitution and not from the act of Congress. That it was not the intention of Congress to vest or to attempt to vest in this board an arbitrary discretion to determine what was a fair and reasonable compensation is shown by the language of section 3 which provides, *inter alia*, that this board "shall consider all the facts and circumstances and shall report, as soon as practicable in each case to the President the just compensation calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section 1." The agreement author-

ized in section 1 is to pay just compensation equivalent to the railway operating income during the test period. *It is, therefore, clear that the fact to be determined by this board is the amount that represents the just compensation as defined in section 1 and that the board is limited in its discretion to a finding of this fact.*

FAR REACHING EFFECT OF COURT'S DECISION IN INSTANT CASE

It would be difficult to exaggerate the importance of the questions raised on this appeal. The court's construction of the statutes here involved may directly or indirectly affect claims against the United States settled and unsettled involving many millions of dollars. Section 1 of the Federal Control Act, which is the statute directly involved, of necessity must be considered in its relation to other provisions of the Federal Control and Transportation Acts. By these two acts Congress created a machinery (a) for the operation of the transportation systems of the United States during the federal control period; (b) for the return of such systems to their owners and (c) for compensating the owners for the use of their properties and for the resultant effects of government operation.

Under Section 1 of the Federal Control Act carriers operated by the Government during the Federal control period in effect were guaranteed that their net operating income should be equivalent as nearly as may be to their average net operating income for the three year period ended June 30, 1917, described in the act as the "test period". The President was authorized by this act to release from federal operation those carriers, federal operation of which was deemed not needful. Under Section 204 of the Transportation Act certain carriers privately operated during the Federal Control period were guaranteed the same compensation and under Section 209 of the Transportation Act certain carriers privately operated were guaranteed the same return for the six months following the federal control period, described in the statute as the "guaranty period."

The compensation guaranteed to carriers operated by the government during the federal control period is payable by or through the Director General of Railroads. The Compensation payable to carriers privately operated during any part of the Federal control period and during the six months following the Federal control period is payable upon the certificate issued by the Interstate Commerce Commission.

The measure of compensation, according to our understanding of the statutes involved, is the same in each case, i. e., the difference between the net operating income during the test and federal control periods.

In the instant case the Director General as agent for the President has contended that appellant was never under federal control and that any compensation to which it is entitled is payable under Section 204 of the Transportation Act upon the certificate of the Interstate Commerce Commission. (R. p. 6.) While the record in this case does not show that the Interstate Commerce Commission has determined whether this carrier was ever under federal control, the Commission in other similar cases has refused to make settlements under section 204 on the ground that all such carriers (usually referred to as "The Short Lines"), were under Federal control until relinquished by the Director General at the expiration of the first six months of federal control. (Abilene & Southern Ry. v. Interstate Commerce Commission, 53 Wash. Law Rept. 806).

It is thus manifest that if the court in this case should adopt the view of Government's counsel and hold that in order to entitle a carrier to compensation under Section 1 the claimant must show an actual as distinguished from a technical possession, use, control and operation of its railroad by the Government, it would be necessary for this court to define actual as distinguished from technical operation. Its definition may and probably would affect settled as well as unsettled claims against the United States under this section.

Again if the court should sustain the contention of Government's counsel that appellant to be entitled to receive any compensation under section 1 of the Federal Control Act must show that it suffered a loss during the first six months of the Federal control period caused by some act of the Government or the Railroad Administration a very large number of settled and unsettled claims will necessarilly be affected by this court's decision.

If the court concludes that appellant was privately operated

during the first six months of federal control but is entitled to the difference between its net operating income during the test and federal control periods under Section 204 a number of settled and unsettled claims will likewise be affected, since the Interstate Commerce Commission, as we have seen, has held that lines in this class were under federal operation during the first six months of that period. (Abilene & Southern Ry. v. Interstate Commerce Commission supra)

Viewed from any aspect, therefore, it is manifest that the decision in this case of necessity will have far reaching effect and that the principle involved is one of vital importance to the short lines in the United States which according to the report of the Senate Committee heretofore referred to, serve the smaller communities but are dependent largely for their livelihood upon connecting trunk lines.

Respectfully submitted,

CRIPPLE CREEK & COLORADO SPRINGS RAILROAD CO.
By MILTON C. ELLIOTT,
Attorney.

635 Southern Bldg.,
Washington, D. C.